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In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

NICHOLAS J. LARIONOFF, JR., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes and regulations involved	2
Statement	3
Reasons for granting review	14
Conclusion	20
Appendix A	1a
Appendix B	51a
Appendix C	53a
Appendix D	65a
Appendix E	80a
Appendix F	82a

CITATIONS

Cases:

Bell v. *United States*, 366 U.S. 393	11, 15, 17
Carini v. *United States*, 528 F.2d 738, petition for a writ of certiorari pending, No. 75-1695	13, 14, 15, 17
Lynch v. *United States*, 292 U.S. 571	13

Statutes:

Armed Forces Enlisted Personnel Bonus Revision Act of 1974, Pub. L. 93-277, 88 Stat. 119	5, 10
Sec. 3	11

Statutes—Continued	Page
Tucker Act, 28 U.S.C. 1346(a)(2)	8
37 U.S.C. 308	10
37 U.S.C. 308(a)	5
37 U.S.C. 308(b)	5
37 U.S.C. 308(g)	5, 6
37 U.S.C. 308a	5, 6, 11
37 U.S.C. 906	6
Miscellaneous:	
BUPERS Instruction 1133.18B (December 19, 1968)	7
BUPERS Manual, Article 1050150	4
BUPERS Manual:	
Article C-1407	4
Article C-1407(1)(c)	16
Department of Defense Directive 1304-.14	6
Department of Defense Instruction 1304-.15	6
¶ V.B.1.f.	16
¶ VI.A.	16

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The Solicitor General, on behalf of the United States of America, *et al.*, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-50a) is reported at 533 F. 2d 1167. The statement of the court of appeals denying the petition for rehearing (App. C, *infra*, pp. 54a-64a) is reported at 533 F. 2d 1188. The opinion of the district court

(App. D, *infra*, pp. 65a-79a) is reported at 365 F. Supp. 140.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1976. A timely petition for rehearing, and suggestion for rehearing *en banc*, were denied respectively on April 29, 1976 (App. C, *infra*, pp. 53a-54a), and April 21, 1976 (App. B, *infra*, pp. 51a-52a). By order of July 23, 1976, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including August 27, 1976, and by order of August 17, 1976, further extended the time for filing a petition to and including September 26, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, at the time they agreed to extend their enlistments in the United States Navy, respondents and other class members acquired by contract or under the applicable statutes and regulations a vested right to the payment of "variable reenlistment bonuses."

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and regulations are set forth at Appendix F, *infra*, pp. 82a-100a.

STATEMENT

This class action was brought by seven enlisted personnel in the United States Navy to recover reenlistment bonuses to which they believed they were entitled. Alternatively, they sought rescission of the agreements they had executed extending by two years their original four-year enlistments. Six of the respondents had enlisted in the United States Navy in 1968 or 1969, while the seventh, Johnnie S. Johnson, had enlisted on August 28, 1970 (App. A, *infra*, pp. 3a, 28a; App. D, *infra*, pp. 66a-67a).

At the time of their original enlistments, or shortly thereafter, respondents individually decided to participate in the Navy's Advanced Electronics Field (AEF) training program. The AEF program, which was limited to enlisted personnel with a minimum service obligation of six years, provided training in various electronics fields. Service personnel who successfully completed the program earned a specialized service rating, corresponding to the particular skill they had acquired, and were guaranteed advancement in rank and pay grade (App. A, *infra*, pp. 4a-6a).

In order to qualify for the AEF program, respondents agreed to extend their original enlistments. The "Agreement to Extend Enlistment" executed by respondent Larionoff is typical of those executed by other class members, specifying in pertinent part as follows (*id.* at 5a):

> I[,] NICHOLAS JOHN LARIONOFF JR., * * * having enlisted in the Navy of the United States

on 23 JUN 69 for FOUR years, in consideration of the pay, allowances, and benefits which will accrue to me during the continuances of my service, voluntarily agree to extend my enlistment as authorized by Section 5539, of Title 10, United States Code, and the regulations issued pursuant thereto. I voluntarily agreed to extend my enlistment for a period of TWO years from the date of expiration thereof, subject to the provisions and obligations of my said contract of enlistment of which this, my voluntary agreement, shall form a part.
REASON FOR EXTENSION: "Training (Advanced Electronics Field (AEF) Program * * *). I understand this extension agreement becomes binding upon execution and thereafter may not be cancelled except as set forth in BUPERS Manual, Article C-1407." [1]

* * * * *

SUBSCRIBED and sworn to * * * this 9th day of JULY 1969 and this contract is hereby perfected and accepted for and on behalf of the United States. Service thereunder to begin from the date following the date the original contract of enlistment would have expired had it not been extended. This is the FIRST extension of current enlistment.[2]

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[1] The pertinent provisions of BUPERS [Bureau of Personnel] Manual, Article C-1407, are set forth at Appendix F, *infra*, pp. 97a-98a. These provisions have since been superseded by similar provisions appearing at BUPERS Manual, Article 1050150.

[2] In addition to executing agreements to extend their enlistments, respondents and other class members executed documents requesting assignment to the AEF program and acknowledging their six-year commitments (see App. A, *infra*, pp. 5a-6a).

Respondents and other class members subsequently participated in the AEF training program, and completed it successfully. Upon completing the program, they were advanced to the rank of petty officer third class in the "Communications Technician-Maintenance" (CTM) service rating and were advanced in pay grade from "E-3" ($128.70 per month) to "E-4" ($177.90 per month) (see App. A, *infra*, pp. 6a-7a).

At the time respondents executed their extension agreements, 37 U.S.C. 308(a) and (b)—which have since been amended [3]—obligated the Navy to pay a "regular reenlistment bonus" to service personnel who reenlisted after completing basic training but before completing twenty years of active federal service. For personnel reenlisting for the first time, the amount of the regular reenlistment bonus was computed by multiplying their basic monthly pay by the number of years of their reenlistment. In addition, the Navy was authorized by 37 U.S.C. 308(g)—which has since been superseded [4]—to pay a second reenlistment bonus, commonly called a "variable reenlistment bonus" (VRB), to service personnel who were eligible to receive a regular reenlistment bonus and who were designated as having a "critical military skill."

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[3] Armed Forces Enlisted Personnel Bonus Revision Act of 1974, Pub. L. 93-277, 88 Stat. 119; App. F, *infra*, pp. 86a-87a.

[4] Armed Forces Enlisted Personnel Bonus Revision Act of 1974, Pub. L. 93-277, 88 Stat. 119, 37 U.S.C. 308a; App. F, *infra*, pp. 88a-89a.

Although Congress specified the maximum amount that could be paid to any service member in the form of a variable reenlistment bonus,[5] it left the precise amount to be awarded in individual cases to determination "[u]nder regulations to be prescribed by the Secretary of Defense" (37 U.S.C. 308(g) (superseded); App. F, *infra*, p. 85a).[6]

Pursuant to the authority conferred upon him by 37 U.S.C. 308(g), the Secretary of Defense issued regulations (Department of Defense Directive 1304.14 and Department of Defense Instruction 1304.15)[7] governing administration of the VRB program. Those regulations specified, *inter alia*, the criteria to be used in determining whether particular skills were sufficiently "critical" to the various Services to be included in the VRB program as well as the criteria to be used in assigning multiples, from one to four, to those skills in calculating the amount of the variable bonus to be paid to individual service members. The Secretary delegated to the respective Services the task of designating the skills to be in-

[5] 37 U.S.C. 308(g) provided that the maximum amount a service member could be paid in the form of a variable reenlistment bonus could not exceed four times the amount of the regular reenlistment to which that service member was entitled. App. F, *infra*, p. 85a.

[6] Although 37 U.S.C. 308(g) referred only to reenlistments, a service member who extends his enlistment is "entitled to the same pay and allowances as though he had reenlisted" (37 U.S.C. 906; App. F, *infra*, p. 89a).

[7] The pertinent provisions of these regulations are set forth at Appendix F, *infra*, pp. 90a-93a.

cluded in the VRB program, subject to the Secretary's review and prior approval. The Secretary also instructed the Services to conduct an annual review of the retention and manning levels in the various military skills that had been included in the VRB program to determine if the variable bonuses authorized to be paid to reenlistees possessing those skills should be reduced or terminated.

The implementing instructions subsequently issued by the Navy designated by service ratings those skills for which the Navy had a "critical" need and assigned multiples to those skills depending upon the relative urgency of the Navy's need (measured in terms of manpower shortages and the cost of training new personnel) to motivate persons possessing those skills to reenlist or to extend their enlistments. The list of skills included by the Navy in the VRB program, and the multiples assigned to those skills, were posted and revised periodically, and Navy personnel were advised that "the list of eligible ratings is subject to change" (App. F, *infra*, p. 97a).[8]

At the times respondents agreed to extend their enlistments, completed the AEF training program, and were advanced to the CTM service rating, the CTM rating was included on the Navy's list of critically needed skills. But on March 24, 1972, the Navy announced that effective July 1, 1972, the CTM rat-

[8] The pertinent provisions of BUPERS Instruction 1133.18B (December 19, 1968), which was in effect on the dates respondents agreed to extend their enlistments, are set forth at Appendix F, *infra*, pp. 93a-97a.

ing would no longer be designated as a "critical military skill," and the CTM rating was deleted from the Navy's VRB list on the latter date (App. A, *infra*, pp. 6a-7a). None of the respondents had begun to serve the extensions of their enlistments by that time. When respondents, other than respondent Johnson, began serving their two-year enlistment extensions in late 1972 and early 1973, they inquired about their eligibility to receive variable bonuses. The Navy advised them that while they would receive the regular reenlistment bonus provided by former 37 U.S.C. 308(a), they would not receive a variable bonus because the Navy no longer had a "critical" need for personnel with a CTM service rating and the CTM rating had been removed from the Navy's VRB list prior to their having begun to serve their extension periods. The Navy also advised respondents that the extension agreements they had executed were binding and could not be abrogated because of their ineligibility for variable bonuses (*id.* at 7a-8a).

On March 30, 1973, respondents filed suit in the district court under the Tucker Act, 28 U.S.C. 1346 (a)(2), claiming that the Navy's refusal to pay them variable bonuses averaging $3,500 per man constituted a breach of the extension agreements they had executed and that they were also entitled to variable bonuses on a theory of promissory estoppel.[9] On cross

[9] Respondents filed an amended complaint on August 20, 1973, supplementing their original request for a declaratory judgment with requests that the Navy be ordered to pay them variable bonuses or to acquiesce in rescission of the agreements they had executed extending their enlistments (see App. A, *infra*, p. 9a n. 14).

motions for summary judgment, the district court ruled in respondents' favor and ordered the Navy to pay the variable bonuses respondents had requested (App. E, *infra*, p. 81a).[10]

In the view taken by the district court, respondents' entitlement to variable bonuses depended simply upon the application of ordinary principles of contract law. According to the court, since the Navy had held respondents to the obligations specified in their reenlistment contracts, "mutuality of agreement" required that the Navy be bound similarly (App. D, *infra*, p. 74). In determining the nature of the Navy's contractual obligations to respondents, the court analyzed the apparent purposes of the contracts and invoked the "elemental" rule "that a contract must be construed most strongly against the authors[,] which in this case was the government" (*id.* at 75a). The court therefore concluded that respondents were entitled by contract to the variable bonus they would have received had they begun to serve the extensions of their enlistments at the times they executed their

[10] The district court also certified a class and granted respondents' counsel a portion of the class recovery as attorney's fees. The court's judgment described the class as "those enlisted Navy personnel who had (or earned after entering a special training program) a critical military skill, who signed their first term reenlistment contract when that critical military skill was eligible for a Variable Reenlistment Bonus (VRB), but who were denied the VRB because their reenlistment period began to run after the suspension of the VRB [*sic*] on July 1, 1972 * * *" (App. E, *infra*, pp. 80a-81a).

extension agreements. The source of this contractual entitlement, according to the court, was the phrase "in consideration of the pay, allowances, and benefits which will accrue to me during the continuances of my service," contained in the extension agreements (*id.* at 74a-75a).

The government appealed the grant of summary judgment in respondents' favor, and respondents cross-appealed from the district court's refusal to order the Navy to acquiesce in the rescission of their extension agreements.[11] While the appeals were pending, Congress enacted the Armed Forces Enlisted Personnel Bonus Revision Act of 1974, Pub. L. 93-277, 88 Stat. 119 (App. F, *infra*, 85a-89a) (Bonus Revision Act), to become effective on June 1, 1974. The Bonus Revision Act, most of which is now codified at 37 U.S.C. 308 and 308a, eliminated both the regular and variable reenlistment bonuses provided under previously-existing law. In their places, Congress created a new bonus (commonly referred to as a "selective reenlistment bonus" (SRB)), under which the Services were authorized to pay in addition to basic compensation up to $15,000 to service personnel with critically-needed skills who agreed to reenlist or extend their

[11] The government also challenged the district court's certification of this action as a class action, and respondents challenged those portions of the court's order awarding attorney's fees and refusing to compel the Navy to disclose the names of putative class members (App. A, *infra*, p. 9a). We do not here seek review of the district court's class action determination.

enlistments for a minimum of three years.[12] Although the Bonus Revision Act contained a savings clause protecting the eligibility of service personnel for a regular reenlistment bonus,[13] it did not contain a savings clause protecting eligibility for variable reenlistment bonuses.

On February 17, 1976, the court of appeals affirmed the judgment of the district court in all respects (App. A, *infra*, pp. 1a-50a).[14] After having acknowledged that "'[a] soldier's entitlement to pay is dependent upon statutory right'" (*id.* at 10a n. 15; quoting from *Bell* v. *United States*, 366 U.S. 393, 401), the court proceeded to analyze the relevant statutory pro-

[12] The Bonus Revision Act also created a second new bonus, in amounts up to $3,000, payable to any person "who enlists in an armed force for a period of at least four years in a skill designated as critical, or who extends his initial period of active duty in that armed force to a total of at least four years in a skill designated as critical * * *" (37 U.S.C. 308a; App. F, *infra*, p. 88a).

[13] Section 3 of the Bonus Revision Act provides in pertinent part as follows (App. F, *infra*, pp. 88a-89a):

> [A] member of a uniformed service on active duty on the effective date of this Act, who would have been eligible, at the end of his current or subsequent enlistment, for the reenlistment bonus prescribed in section 308(a) or (d) of that title, as it existed on the day before the effective date of this Act, shall continue to be eligible for the reenlistment bonus under that section as it existed on the day before the effective date of this Act.

[14] The court did remand the case to the district court, but solely for the purpose of determining an appropriate fee for the efforts of respondents' counsel on appeal (App. A, *infra*, p. 50a).

visions and implementing regulations. The court noted that the statutory provisions creating the VRB program left to the Secretary of Defense the task of prescribing conditions of eligibility for receipt of such bonuses (App. A, *infra*, p. 17a), and conceded that "[a]t first glance, the applicable military regulations would seem to support the Government's position" (*id.* at 18a). The court finally concluded, however, that respondents' contention that at the time they agreed to extend their enlistments they acquired a vested right to be paid variable bonuses was both reasonable and consistent with congressional intent. The court noted that its conclusion was "reinforced by our obligation to construe most strongly against the Government, as aginst any other drafter of a contract, ambiguous contract terms that are subject to a reasonable and practical interpretation other than that offered by the drafter" (*id.* at 25a).

Since reenlistment bonuses are not actually paid until the service member begins to serve the period of his reenlistment or extension, and since respondent Johnnie S. Johnson had not completed serving the period of his original enlistment prior to the repeal by Congress of those statutory provisions authorizing the payment of variable reenlistment bonuses, the court dealt separately with Johnson's entitlement to such a bonus. Characterizing Johnson's right to a variable bonus as "contractual" (App. A, *infra*, p. 30a), the court stated that "although Congress may constitutionally impair existing contract rights in the exercise of a paramount governmental power such as

the 'War Powers [Clause] * * *, Congress is 'without power to *reduce expenditures* by abrogating contractual obligations of the United States' " (*id.* at 29a, original emphasis; quoting from *Lynch* v. *United States*, 292 U.S. 571, 580). The court then reviewed the legislative history of the Bonus Revision Act and concluded that "Congress was primarily concerned [in that Act] with reducing government expenditures by more narrowly tailoring the reenlistment bonus scheme to actual military requirements" (*ibid*). It therefore held that Johnson's "contractual entitlement to a VRB" had not been affected by Congress' repeal of the statutory provisions authorizing payment of variable reenlistment bonuses (App. A, *infra*, p. 30a).

The court acknowledged that the Fourth Circuit previously had held in *Carini* v. *United States*, 528 F. 2d 738, petition for a writ of certiorari filed May 21, 1976 (No. 75-1695), that service personnel situated similarly to Johnson had not acquired a contractual entitlement to a variable reenlistment bonus, but noted: "We obviously disagree" (App. A, *infra*, p. 30a n. 35). In the statement issued by the court denying the government's petition for rehearing, the court agreed with the government that at least so far as regular pay for enlistees is concerned, enlistment documents "must be construed to incorporate not only the statutes in force at the time the agreement is signed but future changes in those statutes as well" (App. C, *infra*, p. 61a). But the court reemphasized that under its interpretation of the extension agree-

ments, the Navy had promised respondents and others similarly situated "a specific sum (in the form of a VRB) not dependent on future change" (*ibid.*). The court also again acknowledged that on this point its decision was squarely in conflict with the Fourth Circuit's decision in *Carini* (*id.* at 62a).

REASONS FOR GRANTING REVIEW

The court of appeals' holding that respondents are entitled to the payment of variable reenlistment bonuses misconstrues the terms of the extension agreements executed by respondents, is inconsistent with the regulations governing the variable bonus program, and departs from the settled rule limiting the pay to which military personnel are entitled to that provided by applicable statutes and regulations. The effect of this holding is substantially to impair the ability of Congress and the military to adjust military pay to defense needs within practical budgetary restraints.

The court's holding on the variable bonus issue presented here squarely conflicts with the Fourth Circuit's decision in *Carini* v. *United States*, *supra*. The existence of this conflict has complicated significantly the administration of the variable bonus program, encouraged forum shopping and additional litigation, and raised the possibility that the claims of a substantial number of service members with claims to variable bonuses will be resolved in an inconsistent manner.

1. The court of appeals held here that in the absence of an "express limitation on eligibility" (App. A, *infra*, p. 25a) reserving to the Navy, and to Congress, the power to alter in response to changing circumstances the conditions governing eligibility for variable bonuses, respondents were contractually entitled to bonus payments in amounts equal to those in effect at the times they signed their extension agreements. But even ordinary common law contract principles, which "have no place in the area of military pay" (*Bell* v. *United States*, *supra*, 366 U.S. at 401), would require no such "express limitation on eligibility." And the court's conclusion that the extension agreements otherwise created an entitlement to specific amounts of bonuses is at odds with the terms of those agreements. As the Fourth Circuit pointed out in *Carini* (528 F. 2d at 741):

> [The agreements] were said to be in consideration of the "pay, benefits and allowances which will accrue." There is no reference to a VRB. Indeed, there is no specification at all of what pay will accrue. On its face, it seems to us to mean that the enlistee will receive the pay authorized by statute and regulation from time to time as he performs his service. Indeed, the plaintiffs concede that the monthly salary they receive was not fixed at the rates in effect at the time of the contracts. It is subject to the unfettered control of the Congress.

The Fourth Circuit, unlike the court below, correctly concluded that the amount of any reenlistment bonus to which a service member may be entitled—like the

rate of monthly pay—must be determined by reference to the statutes and regulations in effect at the time the right to payment accrues.

The right, if any, to payment of a variable reenlistment bonus accrues at the time an individual service member begins to serve the extended period of his or her enlistment. The Navy's regulations provide that "[m]embers * * * will receive the award level effective on the date of their * * * extension of enlistment, except as [otherwise] provided * * *." Department of Defense Instruction 1304.15, ¶ VI.A.; App. F, *infra*, p. 93a.[15] The date of extension of enlistment is the date the extension becomes operative, which is defined as "the date on which * * * service thereunder commences * * * [*i.e.*] the date next following the normal date of expiration of enlistment * * *." BUPERS Manual Art. C-1407(1)(c); App. F, *infra*, pp. 97a-98a. Thus, the individual service member's entitlement to a variable bonus is controlled by the award level in effect on the first day of the period of extended enlistment. On the various dates respondents began to serve the periods of their extended enlistments, that award level was zero—and the Navy therefore correctly refused to pay variable bonuses to them.

[15] The "[otherwise] provided" clause refers to ¶ V.B. 1. f. of Instruction 1304.15 (App. F, *infra*, pp. 92a-93a), which provides that if the extension agreement is signed after notice has issued that the bonus is to be reduced as of a date certain, only the smaller bonus will be payable even if the extension pursuant to the agreement begins to run before that date.

By the time respondent Johnson began his period of extended enlistment, the statutory authorization for payment of variable reenlistment bonuses had been repealed. The holding below that Johnson was nevertheless entitled to such a bonus conflicts not only with the governing regulations but with this Court's determination that "[a] soldier's entitlement to pay is dependent upon statutory right." *Bell* v. *United States*, *supra*, 366 U.S. at 401.

2. The Navy consistently has administered the variable reenlistment bonus program by measuring entitlement to such a bonus at the time enlisted personnel began to serve the extended period of their enlistments, and has computed the amount of the bonus to be paid in individual cases in light of the circumstances that existed at those times. The disagreement between the Fourth Circuit in *Carini* and the District of Columbia Circuit in this case has created substantial administrative problems (involving, at least for the present, the prospect that a service member's entitlement to a variable bonus will depend upon the judicial district in which he is located or chooses to bring suit).

A number of practical considerations strongly militate in favor of this Court's resolving the question presented by this case and *Carini* at the earliest practicable time.[16] Unless review is granted in *Carini*, the decision there will be dispositive of the claims of

[16] Because of the conflict, and the importance of the question presented, we have not opposed the petition for a writ of certiorari filed in *Carini*.

the approximately 260 enlisted personnel who joined in that case as plaintiffs.[17] The court of appeals' decision in the present case has even broader applicability since it has proceeded as a representative action on behalf of all enlisted personnel situated similarly to respondents (App. E, *infra*, pp. 80a-81a). Moreover, unless review is granted, it is likely that the conflict represented by the decisions in *Carini* and the present case will deepen; the question presented here has also been presented to the Ninth Circuit [18] and to the Second Circuit,[19] and is awaiting decision in 34 additional suits, brought by or on behalf of thousands of service personnel, in various federal district courts.[20] The Navy estimates that resolution of

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[17] See *Carini*, Pet. 14.

[18] *Collins* v. *Rumsfeld*, C.A. 9. Nos. 75-2935, 75-2967, 75-3238, and 75-3559 (three consolidated appeals and cross-appeals). *Collins* has been briefed and argued, but not decided. Recently, the government appealed from another decision granting a serviceman's request for a writ of habeas corpus, releasing him from any further service obligation, because of the Navy's alleged failure to pay him appropriate bonuses. *Borschowa* v. *Middendorf*, C.A. 9, Nos. 76-2370 and 76-2438.

[19] *Caola* v. *United States*, C.A. 2, No. 76-2052. On July 30, 1976, the Second Circuit entered an order in *Caola* extending the time for filing the government's brief on appeal to and including October 29, 1976. But the court expressly provided in its order that the briefing schedule it had set was subject to change depending upon this Court's disposition of the petitions filed in *Carini* and the present case.

[20] *Aas* v. *Schlesinger*, No. 75-1900 (D.S.C., filed October 28, 1975); *Achterhof* v. *Schlesinger*, No. 75-275 (D. Hi., filed August 8, 1975); *Adkins* v. *Carmody*, No. C-74-2535-AJZ

(N.D. Cal., filed August 25, 1975); *Agnew* v. *Schlesinger*, No. 75-1624 (D.S.C., filed September 16, 1975); *Alderfer* v. *Schlesinger*, No. 74-1854 (D.S.C., filed September 12, 1974); *Aprill* v. *Schlesinger*, No. 75-0142 (D. Hi., filed May 14, 1975); *Armour* v. *Schlesinger*, No. 75-0221 (D. Hi., filed July 1, 1975); *Aubin* v. *Rumsfeld*, No. 76-0150 (D.S.C., filed January 23, 1976); *Bailey* v. *Sylvester*, No. 75-9 (D.S.C., filed January 2, 1975); *Beard* v. *United States*, No. 75-561-Civ-J-S (M.D. Fla., filed August 29, 1975); *Bennett* v. *United States*, No. 75-Civ-4025 (S.D.N.Y., filed August 14, 1975); *Birdsale* v. *United States*, No. C75-510S (W.D. Wash., filed August 25, 1975); *Blockus* v. *Schlesinger*, No. 75-962 (D.S.C., filed June 9, 1975); *Borschowa* v. *Middendorf*, No. C75-599S (W.D. Wash., filed August 18, 1975); *Braswell* v. *Schlesinger*, No. C-75-286-S (W.D. Wash., filed April 24, 1975); *Braye* v. *Webster*, No. 574-484 (E.D. Cal., filed September 12, 1974); *Cowen* v. *United States*, No. 75-615-N (E.D. Va., filed December 2, 1975); *Crawford* v. *Mangol*, No. 75-277 (D.S.C., filed February 17, 1975); *Earley* v. *Schlesinger*, No. 75-0216 (D. Hi., filed April 29, 1975); *Gates* v. *United States*, No. H-76-156 (D. Conn., filed April 8, 1976); *Grzeika* v. *Schlesinger*, No. 75-1220 (D.S.C., filed July 16, 1975); *Herbert* v. *United States*, No. 75-1857 (D.S.C., filed October 21, 1975); *Hiland* v. *United States*, No. C-1-75-452 (S.D. Ohio, filed December 9, 1975); *Johnson* v. *Schlesinger*, No. 75-0079 (D. Hi., filed March 21, 1975); *Johnson* v. *Schlesinger*, No. 1288-75 (D.S.C., filed July 23, 1975); *Kleveno* v. *Rogers*, No. C-74-2535-AJZ (N.D. Cal., filed December 4, 1974); *Potter* v. *Schlesinger*, No. 75-794 (D.S.C., filed May 14, 1975); *Ruble* v. *Schlesinger*, No. 75-0272-N (S.D. Cal., filed May 28, 1975); *Salter* v. *Kilpatrick*, No. C-74-2535-AJZ (N.D. Cal., filed April 28, 1975); *Simmons* v. *Schlesinger*, No. 75-29-N (E.D. Va., filed January 29, 1975); *Switzer* v. *United States*, No. 4-75-11 (D. Idaho; filed April 22, 1975); *Upson* v. *United States*, No. 75-593-N (E.D. Va., filed November 24, 1975); *Wilson* v. *Schlesinger*, No. 75-1344 (D.S.C., filed July 31, 1975); *Wood* v. *United States*, No. 75-0382-T (S.D. Cal., filed July 8, 1975).

On July 16, 1976, the district court entered judgment in favor of the plaintiff service members in *Kleveno* v. *Rogers*, *supra*, but stayed execution of the judgment pending a decision by the Ninth Circuit in *Collins* v. *Rumsfeld*, *supra*.

the issue presented here ultimately will affect approximately 36,000 enlisted personnel. Review of the decisions in this case and in *Carini* thus will relieve the lower courts of a tremendous litigative burden, prevent an unnecessary waste of judicial resources, and ensure that enlisted personnel with claims to a variable reenlistment bonus similar to those involved here and in *Carini* will obtain a consistent disposition of those claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1976.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1211

NICHOLAS J. LARIONOFF, JR., ET AL.

v.

THE UNITED STATES OF AMERICA, ET AL., APPELLANTS

No. 74-1212

NICHOLAS J. LARIONOFF, JR., ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, ET AL.

Appeals from the United States District Court for the District of Columbia

(D.C. Civil 626-73)

Argued March 3, 1975

Decided February 17, 1976

Stephen Daniel Keeffe for appellants in No. 74-1212 and appellees in No. 74-1211.

Neil H. Koslowe, Attorney, Department of Justice, with whom *Carla A. Hills*, Assistant Attorney General at the time the brief was filed, *Earl J. Silbert*, United States Attorney, and Robert E. Kopp, Attorney, Department of Justice, were on the brief, for appellants in No. 74-1211 and appllees in No. 74-1212. *Morton Hollander*, Attorney, Department of Justice and *Michael A. Katz*, Assistant United States Attorney, also entered appearances for appellants in No. 74-1211 and appellees in No. 74-1212.

Before: RICHARD T. RIVES,* *Senior Circuit Judge for the Fifth Circuit*, WRIGHT and MCGOWAN, *Circuit Judges.*

MCGOWAN, *Circuit Judge*: Congress has been continuously concerned from its inception with the problem of maintaining an adequately manned military establishment for the protection of our national interests. Although one controversial response to that problem has been the operation of a system of compulsory military service, Congress has also—especially in recent years—attempted to provide a sufficient monetary incentive to attract men and women to careers in the military. One approach that has frequently been chosen by Congress is the award of a monetary bonus—recently labeled a "Regular Reenlistment Bonus"—to enlisted personnel who reenlist or extend the period of their obligated service.[1] Since

* Sitting by designation pursuant to Title 18, U.S. Code Section 294(d).

[1] *See* text and note at note 16 *infra.*

1965, Congress has also provided an additional reenlistment bonus—a "Variable Reenlistment Bonus"—to enlisted personnel whose skills are in critically short supply.[2] That Variable Reenlistment Bonus (VRB), which is available to enlisted personnel eligible for a Regular Reenlistment Bonus (RRB), is set by regulation at a multiple of the RRB.[3]

The seven named plaintiffs who filed this class suit in the District Court are enlisted personnel in the United States Navy who claim that they are entitled by contract or under the doctrine of promissory estoppel to receive VRBs equal to four times the amount of their respective RRBs. We conclude that the District Court properly asserted jurisdiction pursuant to 28 U.S.C. § 1346(a)(2),[4] and for the reasons set forth below, we affirm the judgment of the District Court ordering payment of VRBs to the named

[2] *See* text and notes at notes 18-22 *infra.*

[3] For an analysis of the effectiveness of VRB awards in eliminating career manning shortages in critically needed skills, see Comptroller General, Military Retention Incentives: Effectiveness and Administration (B-160096) (1974).

[4] Section 1346(a)(2) of Title 28 provides in relevant part:

> The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
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> . . . Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

plaintiffs.[5] We affirm the District Court's order certifying the suit as a class action under Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure and awarding attorneys' fees of $14,729. And finally, we remand the case to the District Court for further proceedings concerning an award of attorneys' fees for the efforts of counsel directed to this appeal.

I. Factual Background

On June 23, 1969 plaintiff Larionoff enlisted in the United States Navy for four years. Shortly thereafter, he underwent a series of tests and interviews to determine his appropriate duty assignment. During the course of those interviews with Navy personnel, Larionoff decided to participate in the Advanced Electronic Field (AEF) training program, successful completion of which would place him in the Communications Technician-Maintenance (CTM) service rating. At the time he decided to enter the AEF program, Larionoff was aware that the CTM rating was classified as a "critical military skill" qualifying for a Variable Reenlistment Bonus equal to four times the amount of an enlisted member's Regular Reenlistment Bonus.[6]

Under applicable Navy regulations, the AEF program involved a six year service obligation, and plaintiff Larionoff consequently executed the following "Agreement to Extend Enlistment":

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[5] The District Court opinion is reported at 365 F. Supp. 140 (D.D.C. 1973).

[6] Affidavit of Nicholas J. Larionoff, App. at 17.

> I NICHOLAS JOHN LARIONOFF JR., B 17 77 88, SNJEF, USN having enlisted in the Navy of the United States on 23 JUN 69 for FOUR years, *in consideration of the pay, allowances, and benefits which will accrue to me during the continuances of my service*, voluntarily agree to extend my enlistment as authorized by Section 5539, of Title 10, United States Code, and the regulations issued pursuant thereto. I voluntarily agreed to extend my enlistment for a period of TWO years from the date of expiration thereof, subject to the provisions and obligations of my said contract of enlistment of which this, my voluntary agreement, shall form a part. REASON FOR EXTENSION: "Training (Advanced Electronics Field (AEF) Program—BuPers ltr Pers-B2131-gn-56 of 31 August 1966). I understand this extension agreement becomes binding upon execution and thereafter may not be cancelled except as set forth in BUPERS Manual, Article C-1407."

App. at 134 (emphasis added). On that same day, plaintiff Larionoff executed a document requesting assignment to the AEF program and acknowledging his six year obligation:

> I fully understand that, by virtue of having been enlisted in the U.S. Navy as a SNJC I am guaranteed assignment to either one of a group of service schools or to [*sic*] duty in a specific apprenticeship field upon successful completion of recruit training. I desire to waive my rights guaranteed by my enlistment contract, and I hereby request that my rate be changed in equal pay grade to SNJEF. This change of rate is re-

> quested for the purpose of: Assignment to the advanced electronics field program. The provisions of this program, the category to which my rate will be changed and the six (06) years service obligation have been fully explained to me.

App. at 135.

On March 9, 1970 Larionoff successfully completed the AEF training program and was advanced to the CTM rating and the E-4 pay grade. He executed a document on that date attesting to his advancement to the E-4 pay grade.[7]

Up to this point in time, neither the Navy nor plaintiff Larionoff had reason to complain about the events that had transpired. The complicating factor, however, was that Larionoff still *expected to receive* a Variable Reenlistment Bonus once he entered into his period of extended service on June 23, 1973. The Navy cast some doubt on that expectation when it announced on March 24, 1972 that effective July 1, 1972 the CTM rating would no longer be designated

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[7] I understand and agree that upon my being advanced to pay grade E-4 in accordance with BUPERSINST 1430.14 series, that page 1A ["Agreement to Extend Enlistment"] date 09 JUL 69, which was executed for the purpose of AEF Program, will become binding and will serve to fulfill the obligated service requirements for automatic advancement. I understand that any future cancellation of obligated service requirements for the purpose of AEF Program will not serve as reason for cancellation of page 1A dated 09 JUL 69 except as set forth in BUPERSMAN 1050300.

App. at 130.

as a "critical military skill" eligible for the VRB award. After realizing that the Navy considered him ineligible for a Variable Reenlistment Bonus, Larionoff had his elected representatives in Congress communicate with the Bureau of Naval Personnel concerning his eligibility for the VRB.[8] These efforts were unsuccessful; the Bureau asserted that the CTM service rating had been removed from the list of eligible service ratings, thus precluding payment of a VRB to plaintiff Larionoff.[9]

The other six named plaintiffs[10] have undergone similar administrative processing by the Navy. They all signed extension agreements[11] subsequent to April 20, 1966 (the date the CTM rating was designated as a "critical military skill") extending their enlistments for two years for the purpose of receiving AEF training; executed documents requesting assign-

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[8] Larionoff apparently also asked his elected representatives to pursue the question of rescission of the extension agreement. *See* App. at 152, 163.

[9] The Bureau also stated that the extension agreement was "legal and binding and may not be abrogated based on [Larionoff's] ineligibility for VRB." App. at 161; *see* note 8 *supra*.

[10] Thomas W. Dietz, Joseph R. Tomaino, Lawrence E. White, Paul E. Boudreau, Johnnie S. Johnson, John Clay Smith.

[11] The affidavits in the record of Dietz, Tomaino, White, and Boudreau indicate that the VRB program was explained to them prior to the execution of their extension agreements, but that no one explained to them that the applicable VRB award level could subsequently be changed. *See* App. at 13, 15, 19, 20.

ment to AEF training and acknowledging their six year obligations; received their training, were advanced to the CTM rating and the E-4 pay grade prior to July 1, 1972; executed documents attesting to their advancement to the E-4 pay grade; entered the extension periods of their enlistments subsequent to July 1, 1972 (the date that the "critical military skill" designation for the CTM rating was terminated); and received their Regular Reenlistment Bonuses.[12]

On March 30, 1973, the named plaintiffs filed this class action [13] in the District Court seeking either payment of the VRB award level in effect when the

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[12] At the time briefs were filed in this case, plaintiff Johnson had not yet entered the extension period of his enlistment and consequently was not eligible at that time *to receive* his Regular Reenlistment Bonus.

As to the other six named plaintiffs, it was stipulated by the parties that they could receive their Regular Reenlistment Bonuses without prejudice to their claims for VRBs. App. at 248.

[13] The initial complaint described the class as follows: "All persons in the U.S. Navy who reenlisted for two years additional duty prior to July 1, 1972, in a critical skill training program pursuant to § 308(g) Title 37 U.S. Code, that had a bonus multiple of four prior to the above date and which was subsequently eliminated upon that date." App. at 8. The amended complaint, filed on August 20, 1973, contained a similar, but not identical, description of the class: "All persons in the U.S. Navy who enlisted for an additional period prior to July 1, 1972 in a critical skill training program pursuant to § 308(g), Title 37 U.S. Code, that as a communications technician had a variable bonus multiple of four prior to the above date and which was subsequently eliminated upon that date." App. at 208-09.

extension agreements were signed or rescission of their extension agreements.[14] On September 28, 1973, the District Court certified the action as a class action pursuant to Rule 23(b)(1)(B); granted plaintiffs' motion for summary judgment and ordered payment of VRBs; and awarded plaintiffs' counsel attorneys' fees of $14,729.00 to be obtained from the class recovery. The Government appeals claiming error with respect to both the grant of the motion for summary judgment and the class certification. The plaintiffs cross-appeal with respect to the failure of the District Court (1) to order rescission, (2) to order disclosure by the government of the names of members of the class, and (3) to compensate adequately plaintiffs' attorneys.

II. Entitlement to the Variable Reenlistment Bonus

Plaintiffs offer two theories to support their contention that they are entitled to receive VRBs. They

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[14] Actually, the initial complaint filed on March 30, 1973 sought only a declaratory judgment, an order setting "the case down for prompt hearing to fashion the relief required for each plaintiff," and such other relief "as is necessary and proper." App. at 11. The District Court granted plaintiffs' counsel leave to amend the complaint to avoid dismissal for lack of subject matter jurisdiction, 365 F. Supp. at 146, and it was in the amended complaint that plaintiffs specifically requested either award of VRBs or rescission. App. at 211. In the event the District Court awarded rescission, plaintiffs asked that defendants be ordered to grant each of the plaintiffs an Honorable Discharge pursuant to 10 U.S.C. § 6291. App. at 211.

first argue that they executed their extension agreements "in consideration of the pay, allowances, and benefits" which were to accrue during the period of extended service, *see* slip opinion pages 4-5 *supra*, and that the term "pay" includes awards of VRB. As an alternative ground, plaintiffs maintain that they are entitled to receive VRBs on a theory of promissory estoppel in that they relied to their detriment on oral representations concerning VRB eligibility made by naval personnel attempting to get them to execute extension agreements. We find it unnecessary to reach the issue of promissory estoppel since we find that under applicable military regulations plaintiffs are entitled to VRBs as part of the "consideration" for which they executed extension agreements.[15] Since our interpretation of the relevant regulations depends in part on the legislative history of the statutory provisions delegating to the Secretary of Defense the authority to prescribe eligibility criteria, we turn first to an analysis of the basic statutory provisions establishing the VRB award.

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[15] The Supreme Court has emphasized that "[a] soldier's entitlement to pay is dependent upon statutory right." Bell v. United States, 366 U.S. 393, 401 (1961). All parties to this case recognize that since the applicable statute provides that payment of VRB awards is to be determined according to "regulations prescribed by the Secretary of Defense," the outcome under the plaintiffs' contract theory depends primarily on our interpretation of the applicable regulations.

A. *Statutory Provisions*

As early as 1795, Congress provided by statute for the payment of a "reenlistment bonus" to members of the armed services who reenlisted within a short period following their separation from the service, and eligibility for that bonus was eventually extended to those who agreed to extend the length of their service obligation prior to the expiration of the period for which they had agreed to serve.[16] The method of

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[16] Early statutes providing a monetary bonus upon reenlistment include: Act of Jan. 2, 1795, ch. 9, § 5, 1 Stat. 408 (reenlistment bounty for certain members of the army); Act of Mar. 3, 1795, ch. 44, § 6, 1 Stat. 430 (same); Act of May 30, 1796, ch. 39, § 7, 1 Stat. 484 (same); Act of Jan. 27, 1814, ch. 7, § 4, 3 Stat. 95 (same); Act of July 5, 1838, ch. 162, § 29, 5 Stat. 260, *as amended*, Act of Aug. 3, 1861, ch. 42, § 9, 12 Stat. 288 (same); Act of Aug. 4, 1854, ch. 247, § 2, 10 Stat. 575, *as amended*, Act of Mar. 3, 1875, ch. 131, § 10, 18 Stat. 419, *as amended*, Act of Aug. 1, 1894, ch. 179, § 3, 28 Stat. 216, *as amended*, Act of May 11, 1908, ch. 163, 35 Stat. 110, *as amended*, Act of June 4, 1920, ch. 227, § 27, 41 Stat. 775 (same); Act of Mar. 3, 1863, ch. 75, § 18, 12 Stat. 734 (same); Act of Aug. 24, 1912, ch. 391, § 2, 37 Stat. 590 (same); Act of June 3, 1916, ch. 134, § 34, 39 Stat. 188, *as amended*, Act of June 4, 1920, ch. 227, § 31, 41 Stat. 775 (same); Act of Mar. 3, 1845, ch. 77, § 9, 5 Stat. 795 (additional pay for certain reenlistments in the Marine Corps.); Act of Aug. 5, 1854, ch. 268, 10 Stat. 586 (same); Act of Mar. 2, 1837, ch. 21, § 3, 5 Stat. 153 (additional pay for certain reenlistments in the naval service); Act of Mar. 2, 1855, ch. 136, § 2, 10 Stat. 627, *as amended*, Act of June 7, 1864, ch. 111, 13 Stat. 120, *as amended*, Joint Resolution No. 62, 29 Stat. 476 (1896), *as amended*, Act of Mar. 3, 1899, ch. 413, § 16, 30 Stat. 1008, *as amended*, Act of Aug. 22, 1912, ch. 335, 37 Stat. 331, *as amended*, Act of July 12, 1921, ch. 44, § 2, 42 Stat. 139.

In 1922, Congress enacted a single and more systematic

computing the amount of the bonus was varied, but by 1954 Congress settled on the following formula: the monthly basic pay of the serviceman at the time of discharge or release *times* the number of years specified in the reenlistment contract. *See* Act of July 16, 1954, Pub. L. No. 506, § 2, 68 Stat. 488.[17]

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piece of legislation authorizing reenlistment bonuses to enlisted members of the army, navy, and marine corps. Act of June 10, 1922, ch. 212, §§ 9-10, 42 Stat. 629-30, *as amended*, Act of June 16, 1942, ch. 413, §§ 10, 19, 56 Stat. 364, 369, *as amended*, Act of Sept. 7, 1944, ch. 407, § 8, 58 Stat. 730, *as amended*, Act of June 28, 1947, ch. 162, § 4, 61 Stat. 192. *See also* Act of Aug. 18, 1941, ch. 364, § 2, 55 Stat. 629, *as amended*, Act of June 16, 1942, ch. 413, § 10, 56 Stat. 364, *as amended*, Act of Oct. 12, 1949, ch. 681, § 531(b)(29), 63 Stat. 838. This coordinated approach to reenlistment bonuses was again overhauled in 1949. Career Compensation Act of 1949, ch. 681, § 207, 63 Stat. 811, *as amended*, Act of July 16, 1954, Pub. L. No. 506, 68 Stat. 488, *as amended*, Act of July 25, 1961, Pub. L. No. 87-103, 75 Stat. 219. These provisions were enacted into positive law in 1962 and *codified as* 37 U.S.C. § 308, *see* Act of Sept. 7, 1962, Pub. L. No. 87-649, 76 Stat. 467, and were restated without substantive change in 1968, *see* Act of Oct. 22, 1968, Pub. L. No. 90-623, §§ 3(1), 6, 82 Stat. 1314-15.

In 1974, Congress amended the relevant statutory provisions to limit eligibility for the reenlistment bonus to those servicemen who possess skills designated as "critical" by the Secretary of Defense. Armed Forces Enlisted Personnel Bonus Revision Act of 1974, § 2(1), 37 U.S.C. § 308 (Supp. IV, 1974). The 1974 amendments also contained a grandfather clause preserving the options of those servicemen eligible for a reenlistment bonus on the date before the effective date of the 1974 amendments. Armed Forces Enlisted Personnel Bonus Revision Act of 1974, Pub. L. No. 93-277, § 3, 88 Stat. 121.

[17] The formula in text applies only to a serviceman's *first* reenlistment; bonus awards for subsequent reenlistments were

The Department of Defense eventually recognized that the statutory formula was inefficient since it failed to vary the monetary incentive for reenlistment according to the needs of the armed services for personnel with particular skills. In other words, if a branch of the armed services was adequately manned except for a critical shortage of communications technicians, that branch would nevertheless be prohibited by statute from offering communications technicians a stronger incentive in the form of a larger reenlistment bonus. Consequently, the President's 1965 legislative proposals to Congress concerning increased pay for servicemen included a recommendation that the Department of Defense be authorized to award an additional flexible reenlistment bonus to enable the Department to provide a strong reenlistment incen-

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calculated according to slightly different formulae producing progressively smaller bonus awards. The *Variable* Reenlistment Bonus awards at issue in this case are a function of the *Regular* Reenlistment Bonus awards for first time reenlistments only. Act of August 21, 1965, Pub. L. No. 89-132, § 3, 79 Stat. 547, *as amended*, Act of Oct. 22, 1968, Pub. L. No. 90-623, §§ 3(1), (5), 82 Stat. 1314-15, *as amended*, 37 U.S.C. § 308 (Supp. IV, 1974).

It is also important to note that Congress has often established a limitation on the total amount that could be paid to an enlisted member in the form of regular reenlistment bonuses. *See, e.g., Career Compensation* Act of 1949, ch. 681, § 207(a), 63 Stat. 811. The Variable Reenlistment Bonus does not count toward this statutory maximum. Act of August 21, 1965, Pub. L. No. 89-131, § 3, 79 Stat. 547, *as amended*, 37 U.S.C. § 308 (Supp. IV, 1974).

tive to those personnel whose skills were in short supply."[18]

The Defense Department urged both the House and Senate Armed Services Committees to act favorably on this Variable Reenlistment Bonus incentive provision:

> Additional reenlistments are needed in specialties accounting for about 40 percent of total enlisted force strength in order to achieve all of the services' manning objectives. The problem is much more serious in a smaller portion of our force. *In a few of the most critically undermanned specialities, comprising about 5 percent of our force strength, losses of $10,000 or more occur whenever a first termer fails to reenlist and operational capability suffers because of service shortages of careerists.* In these skills, additional reenlistment incentives are clearly needed.
>
> The most attractive way to provide a strong reenlistment incentive to first termers in a small

[18] The President proposed adding the following provision to section 308 of Title 37 of the United States Code:

> (g) Under regulations to be prescribed by the Secretary of Defense, or the Secretary of the Treasury with respect to the Coast Guard, a member who is designated as having a critical military skill and who is entitled to a bonus computed under subsection (a) upon his first reenlistment may be paid an additional amount not more than four times the amount of that bonus. An amount paid under this subsection does not count against the limitation prescribed by section (c) of this section on the total amount that may be paid under this section.

H.R. Doc. No. 170, 89th Cong., 1st Sess. 12 (1965).

> part of the force is through a variable reenlistment bonus. *A reenlistment bonus concentrates retention money at the reenlistment decision point, thereby getting the most drawing power per retention dollar.* A variable bonus can be tailored to fit particular skill retention requirements and can be changed as those requirements change since there are no express or implied commitments about future payments. The present reenlistment bonus does not discriminate among skills and thereby does not help solve the selective retention problem.

H.R. Rep. No. 549, 89th Cong., 1st Sess. 47-48 (1965) (emphasis added). *See* S. Rep. No. 544, 89th Cong., 1st Sess 18 (1965); Hearings on H.R. 5725 and H.R. 8714 Before the House Comm. on Armed Services, 89th Cong., 1st Sess., ser. 13, at 2545, (1965) (Statement of then Secretary McNamara). Both committees approved the following Variable Reenlistment Bonus award provision:[19]

> Under regulations to be prescribed by the Secretary of Defense, or the Secretary of the Treasury with respect to the Coast Guard when it is not operating as a service in the Navy, a member who is designated as having a critical military skill and who is entitled to a [Regular Re-

[19] The House committee modified the language of the proposed VRB provision to provide for payment of the VRB in yearly installments, thus easing the tax impact on the recipient. H.R. Rep. No. 549, 89th Cong., 1st Sess. 48 (1965). Except for that modification, the language approved by the committees is essentially the same as that proposed by the President. *See* note 18 *supra*.

> enlistment] bonus . . . upon his first reenlistment may be paid an additional amount not more than four times the amount of that bonus.

In the course of the floor debate over what was to became quite clear the Department of Defense had convinced the Congress that the VRB provision was cost-justified since it would save the Government the cost of training a replacement whenever a first term enlisted member decided to reenlist.[20] *See, e.g.*, 111 Cong. Rec. 17206 (1965) ("[T]he career motivation that will be generated among the hard core elements, specifically the highly technically trained people throughout the services, will more than make up in actual dollars saved for the cost of the legislation.") (remarks of Representative Morton); *id.* at 17206 ("It is just plain good personnel planning to provide a $4,000 bonus to encourage reenlistment rather than pay $10,000 to train a replacement.") (remarks of Representative Bennett); *id.* at 17209 (remarks of Representative Dole); *id.* at 20034 (remarks of Senator Russell). And it is also clear that Congress viewed the VRB provision as an effective incentive to be brought to the attention of enlisted personnel at the point in time when they are choosing whether and how long to continue military service.[21] *See, e.g.*, *id.* at 17201 ("The [variable reenlistment] bonus would channel additional pay into these specialties. It offers the incentive toward career service at just

[20] *See* Deschler v. United States, 203 Ct. Cl. 477, 483-84 (1974); 47 Comp. Gen. 414, 416 (1968).

the time that it will be most effective, when an individual decides whether or not to reenlist.") (remarks of Representative Nedzi).

With these objectives in mind, Congress enacted the VRB provision as recommended by the House and Senate committees, delegating to the Secretary of Defense the authority to issue regulations for the administration of the VRB program. Act of August 21, 1965, Pub. L. No. 89-131, § 3, 79 Stat. 547, *as amended*, Act of Oct. 22, 1968, Pub. L. No. 90-623, §§ 3(1), 5, 82 Stat. 1314-15, *as amended*, 37 U.S.C. § 308 (Supp. IV, 1974).

B. *Military Regulations* [22]

In interpreting the regulations issued by both the Department of Defense and the Department of the Navy with respect to the VRB program, it is important to emphasize the narrow question at issue. The Government takes the position that under applicable military regulations eligibility for a Variable Reenlistment Bonus attaches *at the date of actual entry* into the reenlistment or extension period. Brief at 21. The Government does not argue that appellants would not have been entitled to a VRB if the CTM

[21] *See* Parker v. United States, 198 Ct. Cl. 661, 666, 461 F.2d 806, 809 1972).

[22] The regulations discussed in this section of the opinion are recent regulations imprinted in the Appendix filed with the court. We are told in the Government's brief that similar requirements were contained in earlier versions of the regulations. Brief at 21 n. 13; *see* App. at 89.

service rating had been designated as a critical military specialty when they entered their periods of extended service.[23] Nor does the Government argue that appellants are not entitled to the Regular Reenlistment Bonus that at least until 1974 was automatically paid upon extension or reenlistment.[24] The Government simply maintains that appellants are entitled only to the VRB in effect when they actually entered into the period of extended service, which for each appellant amounts to zero.

At first glance, the applicable military regulations would seem to support the Government's position. The Department of Defense Directive prescribing policies for award of the VRB deals specifically with the question of reduction and termination of VRB awards:

> When a military skill is designated for reduction or termination of award an effective date for reduction or termination of awards shall be established and announced to the field at least 90 days in advance. All awards on or after that effective date in military skills designated for reduction of award level will be

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[23] In its brief, the Government concedes that the term "pay" in the extension agreement includes the VRB. Brief at 16. Thus, if the Navy had *reduced* rather than *terminated* the VRB award level for the CTM rating, the Government would apparently contend that appellants were entitled only to the lower VRB award level.

[24] *See* note 12 *supra*.

> made on or after the effective date in military skills designated for termination of awards.

DOD Directive 1304.14, ¶ IV.F (Sept. 3, 1970). Of course, that Directive is at best ambiguous, in that it is not clear whether a VRB is "awarded" when an enlisted member signs an agreement to extend enlistment or when he or she actually begins to serve the period of extension. Section IV.D.2 of the Directive, however, tells us that "[s]pecific provisions for individual eligibility of enlisted members for receipt of awards" are contained in a separate Department of Defense Instruction.

That separate regulation also addresses the question of reduction and termination of awards:

> Members serving in a military specialty designated for reduction or termination of award under the provisions of subsection IV.F. of reference (a), will receive the award level effective on the date of their reenlistment or extension of enlistment, *except as provided in paragraph V.B.1.f. above.*

Department of Defense Instruction 1304.15, ¶ VI.A (Sept. 3, 1970) (emphasis added). Were it not for the "except" clause, this regulation would also apparently support the Government's interpretation of the VRB program.[25] The question thus becomes

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[25] Actually, it would be possible to read "extension of enlistment" to mean, at least for the purpose of the quoted paragraph, the date on which the extension agreement is signed. Our interpretation of paragraph V.B.1.f., however, makes it unnecessary to clarify that ambiguity.

whether "paragraph V.B.1.f." leads to a different result.

The relevant portion of paragraph V.B.1. provides that "[a]n enlisted member is eligible to receive a Variable Reenlistment Bonus if he . . .

> f. Attains eligibility prior to the effective date of termination of awards in any military specialty designated for termination of the award. Member must attain eligibility prior to the effective date of a reduction of award level to be eligible for the higher award level. *Eligibility attained through any modification of an existing service obligation, including any early discharge granted pursuant to 10 U.S.C. 1171, must have been attained prior to the date the authority approving the modification was notified of the prospective termination or reduction of award in the military specialty.*

(Emphasis added.) And the regulations issued by the Department of the Navy indicate that an extension of enlistment qualifies as a form of "modification of an existing service obligation":

> Member must attain eligibility prior to the effective date of a reduction of award level to be eligible for the higher award level. Eligibility attained through an early discharge for the purpose of immediate reenlistment, *or extension of enlistment, or other modification of an existing service obligation* including any early discharge granted pursuant to article 3840240 of reference (d) (discharge within 3 months of expiration of active obligated service) shall be attained prior

> to the date the authority approving the modification is notified or the prospective termination or reduction of award in the [service rating]. This is the date a command receives the Bureau of Naval Personnel directive announcing termination or reduction of awards in the [service rating].

BUPER INST 1133.18E, ¶ 7.h (Mar. 23, 1972) (emphasis added).

Paragraph V.B.1.f. of the Defense Instruction and paragraph 7.h. of the Navy Instruction were apparently designed to prevent enlisted members from receiving the higher award level of a VRB scheduled for reduction merely by modifying their service obligations *after* learning of the planned reduction but *prior* to its effective date. Thus, if the Navy announced on March 24, 1972 that a VRB with a multiple of four was to be reduced to a multiple of two for the CTM rating effective July 1, 1972, an enlisted member extending his or her service obligation after March 24, 1972 [26] and entering on the period of extension prior to July 1, 1972 would nevertheless be entitled only to the lower VRB award level with a multiple of two. Only those entitled personnel modifying their service obligations prior to March 24, 1972 would have attained eligibility for the higher VRB award level with a multiple of four.

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[26] Actually, the appropriate date is the date the command receives the Navy directive announcing termination or reduction of awards in relevant service ratings. BUPER INST 1133.18E, ¶7.h (Mar. 23, 1972).

The application of these regulations to appellants leads us to conclude that they are entitled to the VRB award level in effect on the date they signed their respective agreements to extend enlistment.[27] Those agreements were executed prior to March 24, 1972, the date on which the Navy announced termination effective July 1, 1972 of the VRB award for the CTM rating. If appellants are otherwise entitled to receive a VRB award, as the Government concedes they are, that award is not to be determined according to the award level in effect on the date they actually entered into their respective periods of extension, but rather according to the award level in effect when they executed their extension agreements.

To hold otherwise would undermine the explicit language of paragraphs V.B.1.f. and 7.h. of the appropriate regulations, in that neither those who extended their enlistments *on or after* March 24, 1972 nor those who extended their enlistments *before* March 24, 1972 could attain eligibility for the higher award if they were to begin their extended service on a date after July 1, 1972. The paragraphs referred to above obviously contemplate a situation in which en-

[27] The applicable military regulations prescribe a number of conditions that must be satisfied before an enlisted member can receive his Variable Reenlistment Bonus. Our decision does not eliminate the other conditions established by the military departments. We merely hold that an enlisted member who extended his or her service obligation and who is *otherwise qualified* for a VRB award—as the Government concedes these plaintiffs are—is entitled to the VRB award level in effect on the date the extension contract is signed.

listed personnel *attain eligibility* prior to the point at which they enter into periods of extended service.

Moreover, the Government's interpretation would lead to results clearly at odds with the explicit congressional objectives. For example, under the Government's approach an enlisted member who signed an extension agreement when the VRB award level was at a multiple was set at four would receive the *higher* award level. Despite the fact that a bonus with a multiple of two was a sufficient reenlistment incentive for that enlisted member, the Government would apparently award him a windfall in the form of a bonus with a multiple of four.

The Government's interpretation would also frustrate congressional objectives by complicating the decision whether to reenlist. The legislative history indicates that Congress intended to offer enlisted personnel a specific sum [28] in addition to the automatic Regular Reenlistment Bonus as an incentive to reenlist in skill areas in critically short supply. Under the Government's approach, an enlisted member (with a skill designatee as critical) considering extension of service would have to weigh not the current VRB award level, but the VRB award level in effect on the date on which he or she would actually begin serving the period of extension. The latter VRB award level

[28] The sum is "specific" in the sense that it is set by military authorities at some multiple of the Regular Reenlistment Bonus. As noted above, the multiple will vary among service ratings according to the need for enlisted personnel with particular skills.

would be a function of the Navy's manpower needs at that time as well as the extent to which the prospect of an uncertain VRB award level had already helped to satisfy those requirements. Information concerning those factors would rarely be readily accessible to enlisted personnel making a reenlistment or extension decision, and we find no evidence in the legislative background of the 1965 amendments to warrant the conclusion that Congress intended enlisted personnel to make reenlistment decisions in the face of such uncertainty.[29]

The Government authored these extensions contracts, and it could easily have inserted a provision limiting an enlisted member's VRB eligibility to the award level in effect on the date of actual entry into the period of extended service. Undoubtedly, if such a provision had been included, the Navy would have witnessed fewer extensions of enlistment.[30] But there

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[29] Indeed, Navy regulations governing reenlistment interviews for potential reenlistees eligible for the VRB require coverage of the "[a]dvantages of early reenlistment to obtain present amount of VRB vice uncertainty of future value of the VRB." BUPER INST 1133.18E, ¶ 9.a.(6) (Mar. 23, 1972). *See also* note 30 *infra*.

[30] *See, e.g.*, Affidavit of Thomas W. Dietz, App. at 19 ("I would have definitely not signed the Extension of the Enlistment contract if the personnel involved in my counseling procedure had presented the possibility that the VRB could be withdrawn on a moments [*sic*] notice."). Such a contract provision would inform enlisted personnel that they would be making reenlistment decisions in the face of conditions of uncertainty. We note that as a result the effectiveness of the VRB program would depend not only on the expected value of the VRB award at the time of actual entry into the period of extended service, but also on the attitudes of enlisted personnel toward risk. Friedman & Savage, *The Utility Analysis of Choices Involving Risk*, 56 J. Pol. Econ. 279 (1948); *see* R. Posner, Economic Analysis of Law 72-73 (1972) (discussing the relevance of attitudes toward risk in the accident field). In effect, the Government's interpretation of the regulations (or a contract provision making that interpretation explicit) provides enlisted personnel with an opportunity to purchase a "lottery ticket" by signing agreements to extend enlistment; the "lottery ticket" offers some probability of a VRB award equal to the award level in effect at the time the agreement is signed, some probability of a VRB award level less than that in effect at the time of the signing, and some probability of no VRB award at all. And enlisted personnel who are risk averse—that is, they are willing to pay a premium to avoid risk—might well decide against such a gamble, whereas the same personnel would be willing to extend their enlistment in exchange for a contractual promise by the government to offer a sum certain on the date of entry into extended service.

is no express limitation on eligibility, and the Government is therefore bound by the actual contract terms and the applicable military reglations. Although we recognize that these rather complex military regulations are not free from ambiguity, the factors outlined above lead us to conclude that under a reasonable interpretation of the contracts the appellants are entitled to the VRB award level in effect at the time they signed their extension contracts. Our conclusion in that regard is reinforced by our obligation to construe most strongly against the Government, as against any other drafter of a contract, ambiguous contract terms that are subject to a reasonable and practical interpretation other than that offered by the drafter. *United States* v. *Seckinger*, 397 U.S. 203,

210 (1970); 3 A. Corbin, Contracts § 559 (1960). Since the regulations at issue recognize that eligibility can be attained prior to actual entry into the period of extended service, and since the Government's interpretation of the regulations, unlike that of the plaintiffs, is at odds with congressional intent,[31] we construe the contracts to mean that appellants are entitled to the VRB award level in effect when they signed their extension agreements.[32]

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[31] The Government's current interpretation also stands in stark contrast to the Defense Department's recommendation to Congress that "[a] reenlistment bonus concentrates retention money at the reenlistment decision point." *See* slip opinion page 13 *supra*. The two statements can be reconciled only if the date of actual entry into the extension period is a "decision point,"—that is, a point at which plaintiffs could decide not to continue military service. But the Navy has emphasized, and the Government presently contends, that the extension agreements are binding and that the date of actual entry is not a "decision point" for these plaintiffs.

[32] When considered in the context of the entire VRB regulatory scheme, the Government's interpretation of VRB eligibility requirements has the potential of producing serious inequities. Under the relevant Department of Defense Directive, the Secretaries of the Military Departments and the Assistant Secretary of Defense are directed to conduct "an annual review of the retention and career manning situation in any military specialty that has attained or is projected to attain a *career manning level* of more than 105 percent." DOD Directive 1304.14, ¶ IV.F.1 (Sept. 3, 1970) (emphasis added). If, taking into account projected retention and career manning in the absence of the VRB award level, the award is no longer needed to avoid a significant shortage in career manning, the VRB for that specialty must be designated for reduction or termination. *Id.* at ¶ IV.F.1. a, b.

The *career manning level* is the ratio of the number of *Career personnel* in a military specialty to the career requirements of that specialty. *Id.* at ¶ III.K. And *career personnel* is defined to include "first term personnel who are serving in an enlistment, as extended, *or* an extension of enlistment that will total six or more years of active service." *Id.* at ¶ III.I (emphasis added). Consequently, appellants, by extending their enlistments at a time when the VRB award level was set at a multiple of four, may have contributed to the very satisfaction of Navy personnel requirements that led to termination of the VRB for the CTM rating. Indeed, in explaining to plaintiff Larionoff's elected representatives why he was ineligible for the VRB award, the Chief of Naval Personnel wrote: "Although the communications technician (maintenance) rating was formerly VRB eligible, *the most recent review of the manning levels* dictated that it be removed from the eligibility list." App. at 149 (emphasis added).

C. *The 1974 Repeal of the Variable Reenlistment Bonus Program*

Effective June 1, 1974, Congress repealed the statutory provisions providing for the Regular Retirement Bonus and the Variable Reenlistment Bonus and subsubstituted a provision authorizing a new "Selective Reenlistment Bonus" (SRB). Armed Forces Enlisted Personnel Bonus Revision Act of 1974, Pub. L. No. 93-277, § 2(1), 37 U.S.C. § 308 (Supp. IV, 1974).[33] The 1974 amendments specifi-

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[33] The new statute provides in relevant part:

> (a) A member of a uniformed service who—
>
> (1) has completed at least twenty-one months of continuous active duty (other than for training) but not more than ten years of active duty;
>
> (2) is designated as having a critical military skill by the Secretary of Defense, or by the Secretary of Transportation with respect to the Coast

cally provide that an enlisted member on active duty on the effective date of the amendments "who would have been eligible, at the end of his current or subsequent enlistment, for the [Regular Reenlistment Bonus] as it existed on the day before the effective date of [the amendments] shall continue to be eligible for the [RRB] as it existed on the day before the effective date of [the amendments]." But a similar savings clause was not enacted for enlisted personnel eligible for a Variable Reenlistment Bonus before the effective date of the 1974 amendments. Consequently, although it has not been raised by any of the parties, we are confronted with the question whether named plaintiff Johnson, who was scheduled to enter his period of extended service *after* the effective date of the 1974 amendments, is no longer entitled to receive a VRB.[34]

Guard when it is not operating as a service in the Navy;

(3) is not receiving special pay under section 312a of this title; and

(4) reenlists or voluntarily extends his enlistment in a regular component of the service concerned for a period of at least three years;

may be paid a bonus, not to exceed six months of the basic pay to which he was entitled at the time of his discharge or release, multiplied by the number of years, or the monthly fractions thereof, of additional obligated service, not to exceed six years, or $15,000, which ever is the lesser amount. Obligated service in excess of twelve years will not be used for bonus computation.

[34] We are informed by the Government's brief that plaintiff Johnnie S. Johnson was scheduled to begin his period of extended service on August 28, 1974. Brief at 7 n. 9.

Since contractual rights against the government are property interests protected by the Fifth Amendment, Congressional power to abrogate existing government contracts is narrowly circumscribed. *Perry* v. *United States*, 294 U.S. 330 (1935); *Lynch* v. *United States*, 292 U.S. 571 (1934); *see Federal Housing Administration* v. *Darlington, Inc.*, 358 U.S. 84, 97-98 (1958) (Harlan, J., dissenting). And although Congress may constitutionally impair existing contract rights in the exercise of a paramount governmental power such as the "War Powers," U.S. Const. art. I, § 8, cl. 11, 12, 14, Congress is "without power *to reduce expenditures* by abrogating contractual obligations of the United States." *Lynch* v. *United States, supra*, 292 U.S. at 580 (emphasis added); *see id.* at 579. *Compare Schultz* v. *Clifford*, 303 F. Supp. 965 (D. Minn. 1968), *aff'd*, 417 F.2d 775 (8th Cir. 1969), *cert. denied*, 397 U.S. 1007 (1970); *Pfile* v. *Corcoran*, 287 F. Supp. 554 (D. Colo. 1968).

Although the stated purpose of the 1974 amendments was to "provide authority to grant enlistment and reenlistment bonuses to enlisted personnel on a selective basis to fill critical and shortage skill requirements in the armed services in an all-volunteer environment," H.R. Rep. No. 93-857, 93d Cong., 2d Sess. 3 (1974), our review of the legislative history leads us to conclude that the Congress was primarily concerned with reducing government expenditures by more narrowly tailoring the reenlistment bonus scheme to actual military requirements. *See* S. Rep. No. 93-659, 93d Cong., 2d Sess. (1973); H.R. Rep.

No. 93-857, 93d Cong., 2d Sess. (1974); H.R. Conf. Rep. No. 93-985, 93d Cong., 2d Sess. (1974). The Department of Defense specifically recommended the 1974 amendments to Congress as "an opportunity to save money while simultaneously improving our management of reenlistment incentives." S. Rep. No. 93-659, 93d Cong., 2d Sess. 8 (1973); H.R. Rep. No. 93-857, 93d Cong., 2d Sess. 9 (1974).

Since there is absolutely no basis in the legislative history to justify a conclusion that Congress was exercising some paramount power enabling it to abrogate existing contract rights, plaintiff Johnson's contractual entitlement to a VRB stands unimpaired after the 1974 amendments.[35]

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[35] This identical question was recently presented by different groups of naval enlisted personnel to the District Court for the Eastern District of Virginia in *Carini* v. *United States*, Civil No. 74-88-NN (Jan. 7, 1975), to the District Court for the District of Hawaii in *Collins* v. *Schlesinger*, Civil No. 75-0053 (May 20, 1975), to the District Court for the Southern District of California in *Aiken* v. *United States*, Civil No. 75-0062-N (Aug. 26, 1975), and to the District Court for the District of Connecticut in *Caola* v. *United States*, Civil No. H-75-110 (Dec. 4, 1975). Those courts reached the same conclusion as we reach today.

We are aware that the Fourth Circuit has reversed the District Court decision in *Carini* on the ground that the 1965 statute was not "a part of the reenlistment agreement," slip opinion at 6, and that the "contract . . . anticipated possible statutory change," slip opinion at 8. Carini v. United States, No. 75-1399 (Dec. 19, 1975). We obviously disagree. The Government argued that the case before us turns primarily on the construction of the applicable military regulations. Brief at 15. And as our textual discussion indicates, we construe those regulations to mean that VRB eligibility attaches when an extension agreement is signed. Thus, under our view of the case, the contract clause did not anticipate possible statutory changes and an explicit clause would have been necessary to achieve that effect given existing regulations. *See* slip opinion pages 21-22 *supra*.

The Fourth Circuit opinion in *Carini* also places some emphasis on the Congressional intent evidenced in a section of the Conference Report accompanying the 1974 statute ironically labeled "Clarification of interpretation of bill language." H.R. Rep. 93-985, 93d Cong., 2d Sess. 4 (1974). Even if we were to agree that the language in the report indicates that Congress intended to allow the members of this class to become eligible for the new Selective Reenlistment Bonus "if, during the initial enlistment period, the old reenlistment extension agreements are cancelled and new ones executed calling for a longer period of extended service," slip opinion at 6, we would still be unable to find any reason to justify congressional abrogation of existing contract obligations to members of the class.

D. *The Issue of Rescission of the Extension Agreements*

The amended complaint, asserting jurisdiction under the Tucker Act, 28 U.S.C. § 1346(a)(2), asked that the Government "be ordered to pay to each of the plaintiffs the bonus provided by his contract *and/or the contracts of the plaintiffs be deemed rescinded and declared of no further force and effect.*" App. at 211 (emphasis added). Plaintiffs now maintain that the District Court erred when it refused to declare the contracts rescinded.

Rescission is an equitable remedy, and we must keep in mind that courts exercising Tucker Act jurisdiction generally do not have jurisdiction over suits for equitable relief against the United States. *Rich-*

ardson v. *Morris*, 409 U.S. 464, 465 (1973); *see Lee* v. *Thorton*, 420 U.S. 139 (1975). The Act authorizes jurisdiction only over actions for money judgments. *United States* v. *King*, 395 U.S. 1, 2-3 (1969); *see United States* v. *Jones*, 131 U.S. 1 (1889). There nevertheless seems to be a narrow "exception" to this limitation on Tucker Act jurisdiction, in that "[w]here the relief is monetary, [courts exercising Tucker Act jurisdiction] can call upon such equitable concepts as rescission and reformation to help . . . reach the right result." *Quinault Allottee Association* v. *United States*, 453 F.2d 1272, 1274, n.1, 197 Ct. Cl. 134, 138 n.1 (1972); *see United States* v. *Milliken Imprinting Co.*, 202 U.S. 168, 173-74 (1906).

We have serious doubts as to whether the plaintiff's request for judicial rescission of their extension contracts falls within this narrow exception since it is hard to conceive of how granting that request would be "in aid of [a money] judgment." *Blanc* v. *United States*, 244 F.2d 708, 709 (2d Cir. 1957). *Compare C. N. Monroe Manufacturing Co.* v. *United States*, 143 F. Supp. 449 (E.D. Mich. 1956); *Kemp* v. *United States*, 38 F. Supp. 568 (D. Md. 1941). *See also Universal Transistor Products Corp.* v. *United States*, 214 F. Supp. 486 (E.D.N.Y. 1963). We find it unnecessary to resolve these doubts one way or the other, however, since on the basis of the record before us we would find it impossible to sustain a judicial decree of rescission. The payment of VRBs to the plaintiffs is an adequate legal remedy, and we have been offered no evidence indicating that

there are exceptional circumstances in this case that justify the grant of equitable relief.

We therefore conclude that the District Court properly limited the relief in this case to the award of VRBs.

III. Class Action Issues

On September 28, 1973, in the same order granting plaintiffs' motion for summary judgment, the District Court certified this suit as a class action under Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure.[35] The Government argues on this

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[35] We note that the Government has not challenged on this appeal the merits of the District Court's ruling with respect to the maintenance of this suit as a class action under Rule 23(b)(1)(B). That subdivision covers cases in which "the prosecution of separate actions by or against individual members of the class would create a risk of . . . adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." For a suit to qualify as a class action under this subdivision, it is not necessary for the nonclass judgment to be technically dispositive of the interests of the other members of the putative class, *see* 7A C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1774, at 14 (1972), but it must as a practical matter conclude the interests of those members.

It has been held that if the only practical effect which the putative class action would have on the interests of other members of the class is a *stare decisis* effect on actions filed in the same jurisdiction and perhaps a persuasive effect on actions filed in other jurisdictions, the suit would not qualify as a class action pursuant to Rule 23(b)(1)(B). *E.g.*, Lamar v. H & B Novelty & Loan Co., 489 F.2d 461, 467 (9th Cir. 1973); Richardson v. Hamilton Int'l. Corp., 62 F.R.D. 413

(E.D. Pa. 1974). As the Ninth Circuit recently observed, allowing the *stare decisis* consequences of an individual action to supply the practical disposition or substantial impairment of the rights of the class "would make the invocation of Rule 23(b)(1)(B) unchallengeable" in cases meeting the class action prerequisites of Rule 23(a). LaMar v. H & B Novelty & Loan Co., *supra*, 489 F.2d at 467.

In deciding not to challenge the merits of the District Court's ruling, the Government apparently concludes that this case meets the practical effect standard of Rule 23(b)(1)(B) precisely because the Government, unlike private litigants, is required to treat all class members alike. *See, e.g.*, Guadamuz v. Ash, 368 F. Supp. 1233, 1235 (D.D.C. 1973) (action maintained as a class action under Rule 23(b)(1)(A), 23(b)(1)(B), and 23(b)2)); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 291-92 E.D. Pa. 1972) (defendant class action maintained pursuant to Rule 23(b)(1)(B)).

To the extent that there might be doubt that this suit qualifies for class action status under Rule 23(b)(1)(B), we note that the suit would appear to qualify for class action status under Rule 23(b)(1)(A), which covers cases in which the prosecution of separate actions by or against members of the class would create a risk of inconsistent or varying adjudications which would establish incompatible standards of conduct for the party opposing the class. *See* Maricopa County Mun. Water Con. Dist. v. Looney, 219 F.2d 529 (9th Cir. 1955) (cited in Advisory Committee Note to Rule 23(b)(1)(A), 39 F.R.D. 100 (1966)); Guadamuz v. Ash, *supra*. *See generally* 7A C. Wright & A. Miller, *supra*, § 1773 (1974 Supp.); Note, *Community Standards, Class Actions, and Obscenity Under* Miller v. California, 88 HARV. L. REV. 1838, 1868-69 n.130 (1975). In their motion in the District Court to confirm the class, the named plaintiffs sought certification under Rule 23(b)(1)(A) as well as under Rules 23(b)(1)(B), 23(b)(2), and 23(b)(3).

In any event, the failure of the Government to challenge on appeal the propriety of the class designation eliminates the need for us to resolve that issue. Rizzo v. Goode, 44 U.S. L.W. 4095, 4098 n.7 (U.S. Jan. 21, 1976).

appeal that the District Court erred in certifying this suit as a class action because it did not make its class action determination "as soon as practicable after the commencement" of the action as required by Rule 23(c)(1). The Government also presses the argument that due process required personal prejudgment notice to the easily identifiable members of this Rule 23(b)(1) class, and that the failure of the District Court to order such notice consequently requires reversal of the class action certification. Plaintiffs, who had asked the District Court to order the Government to disclose the names and addresses of members of the class, challenge on appeal the refusal of the District Court to honor that request.[37]

[37] We find it somewhat difficult to summarize the precise position taken by plaintiffs with respect to the disclosure issue. In their petition to the District Court for reconsideration of its decision, they state: "Although certified as a class under Rule 23(b)(1)(B), . . . the notice provisions of Rule 23(c) do apply as an element of due process in a given set of circumstances, Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (CA 2, 1968) and that the circumstances herein demand notice to the class." App. at 269. They then state in their brief on apepal that "[t]his defect may be cured in this Court." Brief at 19. Taken together, these statements could be read to assert that the full *notice requirements* of Rule 23(c)(2) are applicable, including notice concerning the opportunity to "opt out", but that those requirements can be satisfied even after the District Court has entered its judgment. There is, of course, no opportunity to "opt out" of a 23(b)(1) action. On the other hand, the citations in their brief to Fed. R. Civ. P. 23(d) can be read to assert that the District Court had authority under Rule 23(d) to require the Navy Department to *disclose* the names of the members of the class and that the failure of the District Court to exercise

A. *The Requirements of Rule 23(c)(1)*

Rule 23(c)(1) provides:

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

The Government argues that the District Court's action certification must be reversed as inconsistent with Rule 23(c)(1) in that the District Court "did not make a class action determination until the entry of final judgment, some six months after the action commenced." Brief at 25-26.

Clearly, a District Court cannot simultaneously certify an action under Rule 23(b)(3) and enter a final judgment in the action since Rule 23(c)(2)[38]

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that authority was error. We will proceed to treat the argument as one directed at a Rule 23(d) order requiring *disclosure* rather than as one directed at the Rule 23(c)(2) *notice* requirements.

[38] Rule 23(c)(2) provides:

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specific date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

expressly requires *prejudgment* notice to the absent members of a Rule 23(b)(3) class concerning, among other things, their opportunity to "opt out" of the class.[39] *See Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 173-77 (1974). But this suit was certified as a class action pursuant to Rule 23(b)(1)(B), and there is nothing in Rule 23 itself requiring *prejudgment* notice to members of a Rule 23(b)(1)(B) class. Putting to one side the question of a due process requirement of prejudgment notice to absent members of a Rule 23(b)(1) class, we are left with the question of the precise scope of Rule 23(c)(1)'s procedural requirements.

In that regard, we find persuasive a recent analysis of the issue by Justice (then Judge) Stevens:

> The rule unquestionably allows the district judge to exercise his discretion in deciding upon the earliest "practicable" time to determine whether the case is to be processed as a class action; but the text certainly implies, even if it does not state expressly, that such a decision should be made in advance of the ruling on the merits. For the explicit permission to alter or amend a certification order before decision on

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[39] Roberts v. American Airlines, No. 74-1108 (7th Cir. Dec. 8, 1975), slip opinion at 10-11; Peritz v. Liberty Loan Corp., 523 F.2d 349, 354 (7th Cir. 1975) ("Section 23(c)(1) makes it plain in the second sentence thereof that the order determining class status is to be made and finalized 'before the decision on the merits.' ").

> the merits plainly implies disapproval of such alteration or amendment thereafter. On the other hand, that degree of flexibility permitted before the merits are decided also indicates that in some cases the final certification need not be made *until* the moment the merits are decided.

Jimenez v. *Weinberger*, No. 75-1046 (7th Cir. Sept. 12, 1975), slip opinion at 11 (emphasis in original).

Applying that analysis to the facts of this case, we do not think that the District Court committed reversible error in simultaneously certifying the case as a class action and entering summary judgment for the plaintiffs. In the first place, although the Government is correct in stating that the class action was not certified until "some six months after the action commenced," the final certification cannot be considered unreasonably delayed. Plaintiffs filed this suit on March 30, 1973 "on behalf of themselves and on behalf of all others similarly situated," and they filed a motion to confirm the class on April 23, 1973. The Government, after requesting two extensions of time, eventually filed its memorandum in opposition to the motion to confirm the class on June 27, 1973. After the named plaintiffs filed responsive papers in early August, the District Court heard oral argument on plaintiffs' various motions and directed the parties to complete the filing of additional papers by August 24, 1973. Although the District Court could have been more prompt in certifying the action, we do not consider the September 28, 1973 order untimely.[40]

Moreover, absent some showing of actual prejudice either to the Government or to the absent class members, we cannot conclude that the simultaneous entry of the judgment and the class action certification was reversible error. The only prejudicial factor which the Government suggests in this case is that simultaneous entry of the orders precludes the *prejudgment* notice to absent class members that is allegedly required under concepts of due process. It is to that issue that we now turn.

B. *Due Process Notice Requirements*

This case thrusts us directly into the controversy over the precise prejudgment notice requirements in

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[40] "[T]he time when a hard determination is 'practicable' as to the propriety of a class action will obviously vary from case to case. . . . [I]t may not be possible to decide even tentatively near the outset of the case whether it should continue as a class action." Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 41-42 (1967). *See, e.g.*, Philadelphia Elec. Co. v. Anaconda American Brass Co., 42 F.R.D. 324, 325 (E.D. Pa. 1967) (the class action question will remain open for at least two or three months given the fact that "[c]ounsel have requested leave to file affidavits, counter affidavits and briefs on this issue, and have indicated that they wish oral argument and possible additional discovery. . . ."). We think it was appropriate for the District Court to wait at least until the Government provided additional background information relevant to the issue of maintenance of the suit as a class action. *See, e.g.*, Baxter v. Savannah Sugar Ref. Corp., 46 F.R.D. 56, 59-60 (S.D. Ga. 1968).

Rule 23(b)(1) class actions."[41] The express language of Rule 23 requires prejudgment notice only to absent members of a Rule 23(b)(3) class, but a number of courts have concluded that "notice is required as a matter of due process in all representative actions, and 23(c)(2) merely requires a particularized form of notice in 23(b)(3) actions." *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 564-65 (2d Cir. 1968), *on remand*, 52 F.R.D. 253 (S.D.N.Y. 1971), 54 F.R.D. 565 (S.D.N.Y. 1972), *rev'd.*, 479 F.2d 1005 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974). *Accord*, *Schrader* v. *Selective Service System Local Board No. 76*, 470 F.2d 73, 75 (7th Cir.), *cert. denied*, 409 U.S. 1085 (1972); *Zeilstra* v. *Tarr*, 466 F.2d 111, 113 (6th Cir. 1972) (dictum); *e.g.*, *Branham* v. *General Electric Company*, 63 F.R.D. 667, 669-71 (M.D. Tenn. 1974); *Richmond Black Police Officers Association* v. *Richmond*, 386 F. Supp. 151, 158 (E.D. Va. 1974). We note, however, that there is also considerable authority for the position that prejudgment notice to absent class members is not required in actions certified under sections of the Rule other than 23(b)(3). *Katz* v. *Carte Blanche*

[41] The existing literature and case discussion concerning this due process issue calls to mind a remark that Professor George Stigler made in the opening section of one of his major contributions to the theory of oligopoly: "No one has the right, and few the ability, to lure economists into reading another article on oligopoly theory without some advance indication of its alleged contribution." Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964). Fortunately, judges, unlike economists, have a captive audience.

Corp., 496 F.2d 747, 756 (3d Cir.) (Rules 23(b)(1) and 23(b)(2)), *cert. denied*, 419 U.S. 885 (1974); *Yaffe* v. *Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972) (Rule 23(b)(2)); *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969) (Rule 23(b)(2)) (by implication); *id.* at 1127 n.1 (Rule 23(b)(2)) (Godbold, J., concurring); *e.g.*, *Lynch* v. *Household Finance Corp.*, 360 F. Supp. 720, 722 n.3 D. Conn. 1973) (three-judge court) (Rule 23(b)(2)); *Woodward* v. *Rogers*, 344 F. Supp. 974, 980 n.10 (D.D.C. 1972), *aff'd without opinion*, 486 F.2d 1317 (D.C. Cir. 1973) (Rule 23(b)(2)); *Northern Natural Gas Company* v. *Grounds*, 292 F. Supp. 619, 636 (D. Kan. 1968) (Rules 23(b)(1) and 23(b)(2)); *Johnson* v. *Baton Rouge*, 50 F.R.D. 295, 299 (E.D. La. 1970) (Rule 23(b)(2)). *See also* 3B Moore's Federal Practice ¶ 23.55 (Rules 23(b)(1) and 23(b)(2)); 7A C. Wright & A. Miller, Federal Practice & Procedure: Civil § 1786 (Rules 23(b)(1) and 23(b)(2)). As the extent of the controversy among the various courts no doubt suggests, the due process issue is a difficult one. But our review of recent decisions in this and other federal courts indicates that the controversy has diminished considerably after the Supreme Court's decisions in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) and *Sosna* v. *Iowa*, 419 U.S. 393 (1975).

The question before the Court in *Eisen* was whether Rule 23(c)(2), which requires in Rule 23(b)(3) actions "the best notice practicable under the circumstances, including individual notice to all mem-

bers who can be identified through reasonable effort," was satisfied by notice through publication rather than individual notice to the two and one quarter million easily identifiable members of a Rule 23(b)(3) class.[42] Noting that the language of the Rule is "unmistakeable", the Court held that individual notice is the "best practicable notice" with respect to those class members whose names and addresses are easily identifiable. At the same time, however, the Court emphasized that it was concerned "only with the notice requirements of subdivision (c)(2)," which is by its terms inapplicable to actions certified under 23(b)(1) or 23(b)(2).[43] 417 U.S. at 177 n.14.

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[42] The actual notification scheme consisted of four elements:

> (1) individual notice to all member firms of the Exchange and to commercial banks with large trust departments; (2) individual notice to the approximately 2,000 identifiable class members with 10 or more odd-lot transactions during the relevant period; (3) individual notice to an additional 5,000 class members selected at random; and (4) prominent publication notice in the Wall Street Journal and in other newspapers in New York and California. The [District Court] calculated that this package would cost approximately $21,720.

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 167 (1974).

[43] The Advisory Committee's Note to Rule 23 makes it clear that the Advisory Committee thought that due process required prejudgment notice in Rule 23(b)(3) cases: "[M]andatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject." 39 F.R.D. 69, 106-107, *citing* Mullane v. Central Hanover Bank & Trust Company, 339 U.S. 306 (1950) and similar cases.

It is uncertain, however, whether the Supreme Court would conclude that due process requires *individual* prejudgment

Sosna decided just last Term, provides some firm indication that the Court intends to pursue a different approach to notice problems in actions certified under sections other than 23(b)(3). *Sosna* involved a class suit for declaratory and injunctive relief challenging the constitutionality of Iowa's durational residency requirement for divorce petitions. Recognizing that "it [was] contemplated that all members of the class will be bound by the ultimate ruling on the merits," 419 U.S. at 403, the Court first satisfied itself that the conditions of Rule 23(a) had been met. *Id.* As to the issue of notice in a Rule 23(b)(2) action, the Court stated in a footnote that "the

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notice. As Professor Dam has noted, "[a] close reading of Mr. Justice Powell's opinion [in *Eisen*] suggests that he did not want to base the notice holding on the Constitution. Yet his plain meaning methodology in interpreting the Rule apparently does not satisfy even him. He returns time and again to due process considerations to give plausibility to his literalist interpretation of the Rule." *Class Action Notice: Who Needs It?*, 1974 SUP. CT. REV. 97, 110. For Professor Dam's discussion of the structure of the opinion in terms of its reliance on the wording of Rule 23 and on due process considerations, see *id.* at 109-111.

It has been persuasively argued that *Mullane* and similar cases do not compel the conclusion that individual notice is required in all Rule 23(b)(3) class actions. *See, e.g.*, Note, *Managing the Large Class Action*: Eisen v. Carlisle & Jacquelin, 87 HARV. L. REV. 426, 433-441 (1973). But even were the Supreme Court to conclude that due process required individual notice in Rule 23(b)(3) actions, application of the *Mullane* balancing approach could lead to different results with respect to Rule 23(b)(1) and 23(b)(2) actions given the different interests at stake. Indeed, the subsequent textual discussion of *Sosna* suggests that very conclusion.

problems associated with a Rule 23(b)(3) class action, which were considered by this Court last Term [in *Eisen*], are not present in this case." *Id.* at 397 n.4.

Recognizing that the Court seems to have relied primarily on the language of the Rule rather than on constitutional grounds, a number of lower federal courts have concluded that *Eisen* and *Sosna* strongly imply that notice is not required in actions brought under subdivisions other than 23(b)(3). *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 878-79 (5th Cir. 1975) (Rules 23(b)(1) and 23(b)(2)); *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F.2d 239, 255-57 (3d Cir.) (Rules 23(b)(2)), *cert. denied*, 421 U.S. 1011 (1975); *Mattern* v. *Weinberger*, 519 F.2d 150, 157-58 (3d Cir. 1975) (Rule 23(b)(2)) (*citing Wetzel, supra*); *Molina* v. *Weinberger*, No. 74-1611 (9th Cir. Oct. 1, 1975), slip opinion at 11-14 (Rule 23(b)(2)); *e.g.*, *American Finance System, Inc.* v. *Harlow*, 65 F.R.D. 94, 110-11 (D. Md. 1974) (Rule 23(b)(2)). Indeed, the Second Circuit has now concluded that prejudgment notice is not required in 23(b)(2) actions, *Frost* v. *Weinberger*, 515 F.2d 57, 65 (2d Cir. 1975) (Friendly, J.), *see Ives* v. *W. T. Grant Company*, No. 74-462 (2d Cir. July 31, 1975), slip opinion at 5252, and the Seventh Circuit has indicated that its *Schrader* opinion will have to be reexamined in light of *Eisen*, *Bijeol* v. *Benson*, 513 F.2d 965, 968 n.3 (7th Cir. 1975).

Our own resolution of the due process claim in a Rule 23(b)(1) action must also take into account the recent decision by this court in *Childs* v. *United States Board of Parole*, 511 F.2d 1270 (D.C. Cir. 1974). The panel in that case, citing the Supreme Court's *Eisen* decision, upheld the District Court's grant of relief to members of a Rule 23(b)(2) class despite an argument by the Government that the absence of prejudgment notice in that case violated due process. *Id.* at 1276. We think that a similar resolution of the due process issue should obtain here; the factors that have prompted courts and commentators to conclude that due process does not require notice in Rule 23(b)(2) class actions are equally applicable to actions certified under Rule 23(b)(1).[“]

[“] In representative actions brought under [subdivisions other than Rule 23(b)(3)], the class generally will be more cohesive—for example, in many instances each member will be affected as a practical matter by a judgment obtained by another member if individual actions were instituted. Similarly, it is less likely that there will be special defenses or issues relating to individual members of a Rule 23(b)(1) or Rule 23(b)(2) class, than in the case of a Rule 23(b)(3) class. This means that there is less reason to be concerned about each member of the class having an opportunity to be present. Thus, in suits under subdivisions (b)(1) or (b)(2), once the court determines that the members are adequately represented as required by Rule 23(a)(4), it is reasonably certain that the named representatives will protect the absent members and give them the functional equivalent of a day in court.

In keeping with this philosophy, class members in Rule 23(b)(1) and Rule 23(b)(2) actions are not provided

Unlike the situation with respect to members of a Rule 23(b)(3) class, the members of a Rule 23(b)(1) class are likely to be more unified in the sense that there will probably be little interest on the part of individual members in controlling and directing their own separate litigation on the question at issue in the class suit. Indeed, in a Rule 23(b)(1)(B) class action, adjudications with respect to individual members would as a practical matter dispose of the interests of the absent members or substantially impair or impede their ability to protect their interests. At best, then, notice provides absent members, with an opportunity to monitor the representation of their rights. In such cases, we think that due process is satisfied if the procedure adopted "fairly insures the protection of the interests of absent parties who are to be bound by it." *Hansberry* v. *Lee*, 311 U.S. 32, 42 (1940). We agree with the Ninth Circuit's re-

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an opportunity by the rule to exclude themselves from the action as is true in Rule 23(b)(3) actions. Because they do not have the alternative of bringing a separate suit, notice really serves only to allow those members the opportunity to decide if they want to intervene or to monitor the representation of their rights. As a safety valve, the court is given discretion by Rule 23(d)(2) to direct notice to be given in any class action "for the protection of the members of the class or otherwise for the fair conduct of the action"—a power that is inherent in the court at least in situations having due process overtones.

7A C. Wright & A. Miller, *supra*, § 1786 at 143-44 (footnotes omitted. *See Molina* v. *Weinberger*, No. 74-1611 (9th Cir. Oct. 1, 1975), slip opinion at 12-13.

cent observation that "[o]nly when the purposes in providing class members an opportunity to signify whether representation by named plaintiffs is fair and adequate or to intervene to present additional claims or to otherwise come into the action to, for example, submit views as amici curiae, are in need of being served, does due process require the direction of some sort of notice to absent members" of a Rule 23(b)(1) class. *Molina* v. *Weinberger*, *supra*, slip opinion at 13 (Rule 23(b)(2)). In such cases, notice can be provided pursuant to Rule 23(d)(2)." Since in our view this case does not present special circumstances requiring prejudgment notice, we uphold the District Court's order certifying the class.

C. Disclosure Under Rule 23(d)

Plaintiffs argue that the District Court erred in refusing to grant their request for an order directing the Government to disclose the names and addresses of the members of the plaintiff class. Having considered the context in which this request was made,

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[45] Rule 23(d)(2) provides:

In the conduct of actions to which this rule applies, the court may make appropriate orders: (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action.

we cannot conclude that the District Court abused its discretion in refusing to issue a Rule 23(d) order.

On May 8, 1973, the attorneys for the named plaintiffs wrote to the United States Attorney's Office stating that "it would be helpful for the Court and plaintiffs if the U.S. Navy were to prepare a list of the names and locations of the plaintiffs [sic] class so that we would be in a position upon Court ruling to notify those members of the class." The United States Attorney did not respond favorably to the request. Plaintiffs apparently first mentioned the disclosure issue to the District Court in their opposition to the Government's initial motion for an extension of time in which to respond to the motion to confirm the class. In their written opposition, plaintiffs mentioned their correspondence with the Government, but failed to request a Rule 23(d) order.

As noted earlier, the Government filed a second motion for an extension of time in which to respond to plaintiffs' motion to confirm the class, and it was in their written opposition to that motion that plaintiffs formally requested an order requiring the Government to disclose the names and addresses of the class members. No reasons were offered to support that request; plaintiffs simply asked for a disclosure order "in addition" to a requested order fining the Government $500 per day per plaintiff for its continued delay in filing responsive papers.

The judgment entered by the District Court complied in all respects with Rule 23(c) in that it described the members of the plaintiff class. Absent

some articulation of the reasons why plaintiffs thought a disclosure order would be necessary to protect the interests of absent class members, the District Court certainly cannot be said to have abused its discretion in denying the requested order.

IV. Attorneys' Fees

Plaintiffs' counsel asked the District Court to award them attorneys' fees in the amount of $175,000, approximately 25% of their estimate of the total class recovery. The District Court chose not to follow a percentage of recovery approach and instead relied on the standards for computing attorneys' fees that it had fashioned in *Kiser* v. *Miller*, 364 F. Supp. 1311 (D.D.C. 1973). Application of the District Court's *Kiser* approach to this case produced an award of $14,729. Shortly after appellate briefs in this case were filed, this court approved the approach which the District Court had taken in *Kiser*. *Kiser* v. *Huge*, No. 73-1393 (D.C. Cir. August 5, 1974), slip opinion at 29-37, 517 F.2d at 1289-93.[46] Recognizing here, as we did in *Kiser*, that "we must pay considerable deference to the District Court's exercise of equitable discretion in setting [attorneys'] fees," slip opinion at 29, 517 F.2d at 1289, we cannot say that the District Court's evaluation of the relevant fac-

[46] This court granted rehearing en banc on October 2, 1974, but eventually reinstated that portion of the panel opinion dealing with the attorneys' fees issue. Pete v. UMWA Welfare & Retirement Fund, 517 F.2d 1275, 1279, 1289-93 (D.C. Cir. 1975).

tors produced an unreasonable, albeit quite modest, award.

The District Court properly withheld calculation of that portion of the attorneys' fees award dealing with the efforts of counsel directed at this appeal, *see Kiser, supra*, slip opinion at 35-36, 517 F.2d at 1292, and we therefore remand the case to the District Court for a determination with respect to that question.

It is so ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1975

Civil Action 626-73

[Filed Apr. 21, 1976, United States Court of Appeals for the District of Columbia Circuit, George A. Fisher, Clerk]

No. 74-1211

NICHOLAS J. LARIONOFF, JR., ET AL.

v.

THE UNITED STATES OF AMERICA, ET AL., APPELLANTS

No. 74-1212

NICHOLAS J. LARIONOFF, JR., ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, ET AL.

Before: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges.

ORDER

The suggestion for rehearing *en banc* filed herein by defendants-appellants and cross-appellees, United States of America, et al., having been transmitted to the full Court and no Judge having requested a vote thereon, it is

ORDERED by the Court *en banc* that the aforesaid suggestion for rehearirg *en banc* be, and it hereby is, denied.

Per Curiam

For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1975

Civil Action 626-73

[Filed Apr. 29, 1976, United States Court of Appeals for the District of Columbia Circuit, George A. Fisher, Clerk]

No. 74-1211

NICHOLAS J. LARIONOFF, JR., ET AL.

v.

THE UNITED STATES OF AMERICA, ET AL.,
APPELLANTS

No. 74-1212

NICHOLAS J. LARIONOFF, JR., ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, ET AL.

Before: Richard T. Rives,* Senior Circuit Judge for the Fifth Circuit; Wright and McGowan, Circuit Judges.

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* Sitting by designation pursuant to Title 28 U.S. Code Section 294(d).

ORDER

Upon consideration of the defendants-appellants-cross appellees' petition for rehearing, it is

ORDERED by the Court that the aforesaid petition for rehearing is denied.

Per Curiam

For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Statement of Circuit Judge McGowan, joined in by Senior Circuit Judge Rives and Circuit Judge Wright, as to why they voted to deny rehearing.

The Government has filed a petition for rehearing and a suggestion for rehearing *en banc* on the grounds that: (1) the panel opinion "conflict[s] with prior decisions of this Court and with decisions of the Supreme Court holding that public benefits such as the variable reenlistment bonus can never be the subject of 'contract rights' and in the discretion of Congress may be reduced or terminated at any time before they are received"; and (2) the panel opinion "has unduly restricted the paramount powers of Congress, has disregarded a clear declararation of congressional purpose, and has significantly restricted the scope of an important constitutional grant of power" in ruling that Congress was not free to abrogate existing contract rights to the VRB. Because

we are of the view that neither statement accurately reflects the scope of the panel decision, we deny the petition for rehearing.

Before discussing the three primary contentions pressed upon us by the Government, we note that the petition for rehearing focuses only on named plaintiff Johnson and other members of the class who began serving their periods of extended service after the *effective* date of the 1974 statute repealing the Variable Reenlistment Bonus system.[1] Admittedly, the Government does seek a reexamination of the other issues to insure a consistent result among all plaintiffs, but the primary emphasis in the petition is on the disposition of the case given the 1974 repeal of the statute, which is discussed at Part II. C. of the panel opinion.

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[1] We think it appropriate to note why the panel "decided to rule on the effect of the new Act on plaintiff Johnson, even though it acknowledged that the matter had not been raised (and had not been briefed or argued)." Petition at 6. The panel reached the issue precisely because it had no other choice; one of the named plaintiffs had entered into his period of extension *after* the repeal of the statute authorizing the VRB system, and consequently the panel had to satisfy itself that the affirmance of the District Court's grant of relief as to Johnson and others similarly situated was not barred by the subsequent statutory change. The panel purposefully noted in the opinion that the issue had not been raised to highlight the fact that at no time in the course of this appeal did the parties notify the court of the repeal of the authorizing statute.

I

The Government first argues that named plaintiff Johnson had no contract right to a VRB award since "the very nature of the statute . . . which authorized the VRB was such as to prevent the VRB from ever becoming the subject of a 'contractual entitlement' ".[2] Petition at 11. The Government takes the position that the VRB is a "gratuity" which may be altered or repudiated at any time. Our problem with this approach is that it fails to address the narrow issue in the case; the question is not whether a VRB can under some circumstances be considered a gratuity, but whether it ripened to a contract right under the circumstances presented in this record. To be sure, in some contexts, reenlistment bonus awards are "gratuities"; the panel does not, and indeed would not, take the position that once having established a VRB award system the Congress cannot terminate it. As to those enlisted personnel who were planning to reenlist but who took no binding action in that re-

[2] We find somewhat disconcerting the Government's statement that the panel opinion "does not identify the source" of the contractual entitlement to a VRB, and that as a result the Government has had to assume that the contractual entitlement finding is based on the language in the extension agreements promising the named plaintiffs such "pay" as would accrue to them during their periods of extended service. Petition at 7. As footnote 23 of the panel opinion expressly notes, the Government conceded in its brief that the term "pay" in the extension agreements includes VRB awards, and we reject any new suggestion to the contrary in the petition for rehearing.

gard prior to the effective date of the repeal, the VRB is a "gratuity" rather than a contract right. This point is illustrated by *United States* v. *Dickerson*, 310 U.S. 554 (1940), which concerned congressional action on June 21 of 1938 suspending for the fiscal year July 1, 1938 to June 30, 1939 a statutorily authorized reenlistment bonus. Dickerson was discharged on July 21, 1938 and reenlisted the very next day. His expectation that he would receive a bonus upon reenlistment did not confer a contractual right to those benefits, and the Court held that he was covered by the congressional action on June 21 prospectively suspending the reenlistment bonus.[3]

[3] To the same effect are Richardson v. Belcher, 404 U.S. 78 (1971) and Flemming v. Nestor, 363 U.S. 603 (1960), two cases with which the panel opinion allegedly conflicts. In *Belcher*, the plaintiff was receiving social security disability benefits of approximately $330 per month when Congress amended the Social Security law to require a reduction in benefits to reflect receipt of state workmen's compensation benefits. As a result of the amendment, the plaintiff's disability benefits were reduced to approximately $225 per month. The Court expressly noted that "an expectation of benefits [does not] confer a contractual right to receive the expected amounts." 404 U.S. at 80. In *Flemming*, the plaintiff's old age benefits were terminated, as required by statute, when he was deported. The Court there noted: "[E]ach worker's benefits, though flowing from the contributions he made to the national economy while actively employed, are not dependent on the degree to which he was called upon to support the system by taxation. *It is apparent that the noncontractual interest of an employee covered by the Act cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payment.*" 363 U.S. at 609-10 (emphasis added). Named plaintiff Johnson's right to the

But we do not read *Dickerson* to mean that one can never claim a contract right to a benefit which in some contexts has been accurately labeled a gratuity. That just the opposite is true is illustrated by the Supreme Court cases cited by the Government dealing with changes in the salaries of Government officials. For example, in *Fisk* v. *Jefferson Police Jury* the Supreme Court noted:

> [T]hough when appointed the law has provided a fixed compensation for his services, there is no contract which forbids the legislature or other proper authority to change the rate of compensation for salary or services after the change is made, though this may include a part of the term of the office then unexpired. Butler v. Pennsylvania, 10 How. 402.
>
> But after the services have been rendered, under a law, resolution, or ordinance which fixes the rate of compensation, there arises an implied contract to pay for the services at that rate. This contract is a completed contract.

116 U.S. 131, 133-34 (1885).

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benefit of a VRB is bottomed on his contractual obligation to serve his country for an additional two years, and the VRB award depended directly on his willingness to sign an agreement to extend his service.

The other "gratuity" cases relied on by the Government resemble *Belcher* and *Flemming*, rather than the case of the holder of an annuity. *See, e.g.*, Thompson v. Gleason, 317 F.2d 901 (D.C. Cir. 1962) (disability benefits); Barnett v. Hines, 105 F.2d 96 (D.C. Cir.), *cert. denied*, 308 U.S. 573 (1939) (retirement pay).

The salary cases indicate that once someone agrees to perform certain services in exchange for a given sum of money, and the Government has received that performance—or, as in this case, insists on receiving it[4]—the case is different; the "gratuity" becomes a contractual right.[5]

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[4] Plaintiff Johnson's situation differs in one important respect from that of the Government officials in the salary cases: he is not free to leave his job. *Compare* Embry v. United States, 100 U.S. 680, 685 (1879) ("If an officer is not satisfied with what the law gives him for his services, he may resign."). Consequently, the crucial factor concerning contractual entitlement is not whether named plaintiff Johnson has fully served his two year extension, but whether he is required to do so.

[5] In this regard, the Government's citation of Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960) is slightly misleading. The Government quotes Hochman's statement that gratuities "may be altered or repudiated at any time until the benefits conferred by them are actually received." *Id.* at 724. But Hochman goes on to note that the "key element" with respect to whether a benefit is a gratuity appears to be "the absence of any financial cost in the acquisition of the right based upon the original statute." *Id.* at 725. Hochman argues that:

> It should be stressed that the reliance required to remove a right from the category of gratuity . . . is a financial detriment in the acquisition of the right, and not merely reliance on the right after it accrues, as, for example, the making of a financial commitment in reliance upon the statute. The reason for this stricter requirement is probably similar to that encountered in the cases sustaining the extension of statutes of limitation; the . . . gratuity is given by a statute for public purposes which are not controlled by the merits of the donee's claim to the right. Under these circumstances, the Court is reluc-

Thus, our conclusion with respect to the "gratuity" versus "contract right" issue is that mere labels are neither helpful nor determinative. The issue is not whether a given claim to money resembles a "gratuity" in benevolent purpose, but whether the claim *sub judice* differs from a gratuity fundamentally in legal incidents. *See Lynch* v. *United States*, 292 U.S. 571, 576-77 (1934). Here, unlike the social security and other gratuity cases relied on by the Government, there is an agreement between the parties and the plaintiffs have undertaken a serious commitment in order to acquire the right to a VRB, namely, the promise to spend an additional two years in military service. The Government now seeks to enforce the promise to serve and at the same time label the promise it offered in return a mere gratuity. The cases relied on by the Government do no justify that result.[6]

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tant to permit the donee to obstruct a reassessment of these purposes by the legislature.

Id. at 726 (footnote omitted). We would find it difficult to conclude that there was no financial cost in the acquisition of the right to a VRB or that the right to a VRB is not controlled by the merits of the enlisted person's claim—namely, willingness to extend his period of service.

[6] The Government did not press this gratuity argument in its initial brief. The reason for that may be that as to the other named plaintiffs who began serving their extensions prior to the effective date of the repeal, the termination of the alleged "gratuity" was achieved by military regulation rather than by statute. *See* Carini v. United States, 528 F.2d 738, 741 n.7 (4th Cir. 1975). But if the Government is of the view that only Congress could terminate the "gratuity," we fail

II

The Government raises a second but equally unpersuasive argument as to why named plaintiff Johnson did not have a contract right to a VBR award, that enlisted documents must be construed to incorporate not only the statutes in force at the time the agreement is signed but future changes in those statutes as well. Petition at 8. The Government's point on this issue is certainly accurate as to regular pay for enlistees, and cases such as *Johnson* v. *Powell*, 414 F.2d 1060 (5th Cir. 1969), indicate that the Government's point has broad applicability. But this does not mean that Congress is without authority to decide to promise a specific sum, rather than an uncertain sum, to achieve a given result, and this is precisely how the panel interpreted the extension agreement. Our review of the legislative history—which is clear—and the regulations—which at times are ambiguous—led us to conclude that Congress intended—and the regulations provided—a promise to pay a specific sum (in the form of a VRB) not dependent on future change.

As we read the petition, the Government does not argue that Congress is without power to establish a VRB scheme not dependent on future change. Instead, it argues that the contract for a VRB is like the normal contract for military pay—that is, a

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to see how a reexamination of the issues with respect to the named plaintiffs other than Johnson would produce a consistent result. *See* Petition at 15.

contract which anticipates future changes. But that is simply to say that the Government disagrees with the panel's interpretation of the contract; the argument was considered and rejected by the panel, and mere disagreement with the result does not warrant rehearing.

We stress that this is the only point on which we are in conflict with the Fourth Circuit. In *Carini* v. *United States*, 528 F.2d 738 (1975), that court took the position that the contract at issue anticipated possible statutory change, a result reached without analysis of the legislative history or applicable regulations. Moreover, as we indicated at footnote 35 in the panel opinion, all four district courts ruling on the issue disagree with the approach taken by the Fourth Circuit.[7]

III

The final argument raised by the Government is that even if named plaintiff Johnson had a contractual right to a VRB award, Congress was exercising a paramount power in repealing the statue and thus under *Lynch* v. *United States*, 292 U.S. 571 (1934), was constitutionally free to abrogate existing con-

[7] The Fourth Circuit itself was not pleased with the result it felt obliged to reach: "While we hold that there is no enforceable contract right to the payment of the VRBs under the now repealed § 308(g), the situation of these plaintiffs is most appealing. . . . Under the circumstances, the Congress may wish to reconsider their situation and the moral claims they have against the United States." 528 F.2d at 741-42.

tract rights.[8] The Government agrees with the panel's view that there was a fiscal purpose behind the Act, but maintains that "the Act represents a legitimate exercise of Congress' paramount power to 'raise and support armies' and 'to make rules for the government and regulation of the land and naval forces.'" Petition at 15. This is so because "the purpose of the Act was to provide the Defense Department with the recruitment tools it needed to fill critical skill needs in the new All-Volunteer Force." *Id.* at 14. The Government's analysis of the legislative history indicates that the military departments found two deficiencies in the then effective bonus scheme: the authorization of a regular, as opposed to variable, reenlistment bonus without regard to specialty; and the failure to provide a VRB for reenlistments subsequent to the first reenlistment.

We have no disagreement with the Government's assessment of these purposes, but the determinative factor is that they have nothing to do with enlisted personnel who had already agreed to extend their

[8] The Government maintains that it is not clear that *Lynch* sets the correct standard, but nevertheless appears to be willing to concede for purposes of this appeal that the *Lynch* standard applies. Petition at 13 & n.9. Whether *Lynch* requires the exercise of a paramount power or something less—whatever that may be—it is clear that abrogation of contract rights for the sole purpose of reducing expenditures is not constitutionally sanctioned. Since in our view that is the only justification for *retroactive* termination as to named plaintiff Johnson, we need not rehear the case to consider the issue of the outer limits of the *Lynch* doctrine.

enlistments before Congress repealed the prior statute. The purposes identified by the Government speak in prospective terms and are completely unrelated to men who had already agreed to serve the additional two years; as a result, they cannot be used to justify a change in the terms of already binding extension agreements.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 626-73

[Filed Sep. 28, 1973, James F. Davey, Clerk]

NICHOLAS J. LARINOFF, JR., ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

APPEARANCES:

Stephen Daniel Keeffe, Esq.,
Washington, D.C.
John A. Keeffe, Esq.
New York, Of Counsel
For the Plaintiffs.

Harold H. Titus, Jr., Esq.
Arnold T. Aikens, Esq.
Michael A. Katz, Esq.
For the Defendants.

MEMORANDUM OPINION OF
JUDGE CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

This case is before the Court on Cross Motions for Summary Judgment. The Plaintiffs are petty officers in the United States Navy wherein the Plaintiffs

claim entitlement to a reenlistment bonus. They are classified as Communications Technicians-Maintenance (CTM), a service rating which at the time they enlisted was classified as a "critical military skill," and, thus eligible for a Variable Reenlistment Bonus (VRB) payable in two equal installments in each year of the first term reenlistment. The Bonus was four times the regular reenlistment bonus. On July 1, 1972, the Navy reclassified the CTM rating as non-critical and thus allegedly made the Plaintiffs no longer eligible for the VRB. This was prior to the time the Plaintiffs' reenlistment period began to run, but after the time they signed their reenlistment contracts. As indicated, the Navy now refuses to pay the Plaintiffs the VRB. This is a class action where the Plaintiffs are suing for themselves and all those similarly situated for payment of a VRB. They invoke the Court's jurisdiction under the Tucker Act, 28 U.S.C. § 1346(a), claiming that the language in their enlistment contracts entitles them to relief.

II. BACKGROUND OF THE CASE

Each of the seven named Plaintiffs enlisted for four years in the navy at seven different times and places.[1] All were assigned to the Advanced Electronic Field training program. Successful comple-

[1] Boudreau enlisted on 1/13/69 at Boston, Mass.; Dietz on 9/3/69 at Fargo, N.D.; Johnson on 8/28/70 at Los Angeles, Calif.; Larinoff on 6/23/69 at Newark, N.J.; Smith on 10/1/68 at Detroit, Mich.; Tomiano on 3/28/69 at Pittsburgh, Pa.; White on 3/13/69 at Denver, Colo.

tion of this approximately year-long course earned the Plaintiffs rapid promotions and a rating as CTM's, a critical military skill. Assignment to the Advanced Electronic Field program, however, required the Plaintiffs to obligate themselves for six years of Naval service. Each Plaintiff, therefore, had to sign a two-year extension contract on the day he originally enlisted or shortly thereafter.[2]

Between April 20, 1966 and July 1, 1972, "CTM" was classified as a "critical military skill." Pursuant to 37 U.S.C. § 308(g) the holder of a "critical military skill" classification who voluntarily extended his first term enlistment for two years was entitled to a reenlistment bonus not more than four times the amount of the regular reenlistment bonus computed under subsection (a) of § 308.[3] *See, Department of the Navy, Bureau of Naval Personnel Instruction (BUPERSINST)* 1133.18B "Variable Reenlistment Bonus (VRB Program," Dec. 19, 1968. In March of 1972, the Department of the Navy determined that CTM's category did not need special emphasis for recruitment, and removed the rating from the critical skills list, and, as a result, they argue that Plaintiffs are not eligible for the VRB.

[2] Boudreau, Dietz, Johnson and Tomiano signed their extension contracts the same day on which they executed the original four-year commitment. Larinoff signed his contract on July 9, 1969; Smith on October 15, 1968 and White on July 23, 1969.

[3] The bonus was to be paid in equal yearly installments in each year of the reenlistment. 37 U.S.C. § 308(g).

The Plaintiffs maintain that the prospect of eligibility for a VRB as a CTM induced them to sign for the extra two years. Upon examination of the legislative history of the VRB, it appears that Congress intended that the VRB should assist in the attraction and retention of members of the armed forces with critical skills. The VRB was to do this by providing an especially strong reenlistment incentive to first term enlisted personnel in the critical skill areas. *1965 U.S. Code Cong. and Adm. News*, at 2749, 2756-7.

Now that the CTM is not classified as a critical skill, the Navy refuses to pay the Plaintiffs their VRB when their reenlistment periods become effective. The government maintains that (1) the Plaintiffs do not state a claim upon which relief can be granted; and (2) that Court lacks subject matter jurisdiction; and (3) the Plaintiffs have not exhausted their administrative remedies; and (4) the Defendants are not obligated to pay an additional bonus under the terms of the enlistment contracts. The plaintiffs argue that the VRB, statutorily defined as "pay" and paid to all CTMs when the Plaintiffs signed their contracts, is payable to them under their contract terms. The parties agree there is not dispute as to a material issue of fact.

The Court is of the opinion that the Plaintiffs must prevail on all issues raised in this case, with the exception of the award of attorney's fees, for the reasons set out below.

III. THIS SUIT IS A PROPER CLASS ACTION UNDER RULE 23(b)(1)(B) OF THE FEDERAL RULES OF CIVIL PROCEDURE

The proposed class in this suit is composed of all enlisted U.S. Naval Personnel who signed their first reenlistment contracts for two additional years of duty prior to July 1, 1972, and who would have been entitled to a VRB due to their critical skill rating had the period of reenlistment begun to run prior to July 1, 1972. The Plaintiffs estimate the class size to lie between 200 and 400. While they have not supplied any documentation to support this, the Defendants have neither denied this number nor have they supplied a class list.

This case clearly meets the requirements of Rule 23(b)(1)(B) to be certified as a class action. The members of the proposed class are so numerous and geographically dispersed that joinder of all members would be impractical. The sole issue on the merits before the Court requires an interpretation of the contract which the Department of the Navy uses to secure all its reenlistment obligations. This is a matter of law applicable to all parties who are bound by these uniform contracts. Therefore, an adjudication with respect to the individual members of the class would as a practical matter be dispositive of the interests of the other members of the class as defined above.

IV. THE COURT HAS SUBJECT-MATTER JURISDICTION UNDER THE TUCKER ACT

The Tucker Act gives District Courts original jurisdiction, concurrent with the Court of Claims over any claim against the United States not exceeding $10,000 in amount, founded upon any express or implied contract with the United States. 28 U.S.C. § 1346(a)(2). In 1964, Congress amended § 1346 (d)(2), which prohibited district courts from exercising jurisdiction over claims or civil actions to recover fees, salary, or compensation for official services of officers or employees of the United States. This specific action by Congress indicates that district courts can now hear and determine the issues raised in the case at bar.

This suit is for the reenlistment bonus, which Plaintiffs maintain is included in the consideration delineated in their contracts. The pertinent terms of the contract relating to consideration state: ". . . in consideration of the pay, allowances, and benefits which will accrue to me during the continuance of my service, . . .".[4] The term the Plaintiffs em-

[4] The language of the Defendants' printed form "Agreement to extend Enlistment" (NAVPERS FORM 601-1A) says in pertinent part: I (name of enlistee, service number) having enlisted in the Navy of the United States on (date) for (no.) of years, *in consideration of the pay, allowances and benefits* which will accrue to as during the continuance of my service, voluntarily agree to extend my enlistment, as authorized by section 5539 of Title 10, United States Code, and the regulations issued pursuant thereto. . . ." (*emphasis added*).

phasize is "pay." Section 308 of Title 37 of the United States Code terms the reenlistment bonus (including VBR's) as "special pay." The definitional section of Title 37 of the United States Code, Section 101(21) defines "pay" as including special pay. Therefore, the Court determines that the Plaintiffs have made a prima facie case that the suit before the Court is founded upon a contract for compensation between the United States and its employees.

V. THE PLAINTIFFS HAVE EXHAUSTED THEIR ADMINISTRATIVE REMEDIES

The Plaintiffs presented their claims to the Bureau of Naval Personnel and members of Congress. The Defendants maintain this was insufficient to exhaust the Plaintiffs' administrative remedies; the Plaintiffs should have applied to the Board for Correction of Naval Records (BCNR) for relief.

As the Defendants have stated, the purpose of the BCNR is to determine the existence of error or injustice in Naval records and to make recommendations for the correction of those records, if warranted, to the Secretary of the Navy. 10 U.S.C. § 1552. An examination of the language of the law and its legislative history indicates that the act is intended to provide correction of an individual's service record which has entries resulting from the actions of general courts martial and of statutory bodies, such as Boards of Review, and to provide

reimbursement of any compensation which the individual has been denied due to an incorrect or unjust entry. *40 Ops. Att'y Gen. 504 (1947)*. As the Attorney General's opinion emphasizes, the purpose of the act was to relieve Congress of the private bills necessary to effect a correction of such entries. *Id.* at 508.

Back pay due because of an incorrect or unjust discharge or naval record entry is not the relief sought here. Plaintiffs here seek an enforcement of the provisions of their enlistment contracts which were binding upon the Plaintiffs and the government at the time of execution. The Plaintiffs' contracts provided that they could not be cancelled except as set forth in the *Bureau of Personnel Manual (BUPERSMAN), Article C-1407*. The Plaintiffs presented their complaints to the Bureau of Naval Personnel, the body which set the policy for cancellation of enlistment contracts. Through that body, the defendant has given its interpretation of the contract, and denied the cancellation request after reviewing the facts. The matter is appropriately before this Court, whether one views it as a review of an administration's determination of a question of law or in light of 28 U.S.C. § 1346 which gives this Court original jurisdiction over contract questions.

VI. THE PLAINTIFFS ARE ENTITLED TO A VRB WHICH WAS PAYABLE WHEN THEY SIGNED THEIR CONTRACTS FOR THE TWO-YEAR EXTENSION

Turning to the contracts involved in this suit, the Defendants argue that the two contracts should be viewed as one—a six-year obligation in exchange for specialized training only. The Court does not see the contracts as one entity, however. They are two separate documents in form and substance. The first is for the regular four-year enlistment which any person desiring to enlist signs as a matter of course. This contract makes no promises. The second, the reenlistment contract, does make a promise—in exchange for two additional years' obligation, the Navy would provide special schooling leading to a critical military skill rating.

There is no argument that the Plaintiffs have received the benefits of training because they signed reenlistment contracts long before their original enlistment contracts expired. The question is, however, whether these reenlistment contracts also provide for a VRB, in addition to the training, in exchange for the six-year obligation.

As the Court stated, *supra*, in Section IV of this Opinion, the statutory definition of the term "pay" as it applies to the military does include the variable reenlistment bonus. See 37 U.S.C. § 101(21) and § 308. The VRB was intended to induce first term reenlistment among those with such classified skills to insure the Navy maintained an adequate number

of personnel in these areas. At the time the Plaintiffs signed their reenlistment contracts, the Navy was paying the VRB for this purpose. The Navy was thus benefiting from a guaranteed supply of personnel in critical areas. The Plaintiffs committed themselves to a total of six years in one of these critical skills which was receiving the VRB. If the Plaintiffs were bound to the reenlistment contract from the moment of its execution, then mutuality of agreement requires that the Defendants be likewise bound.

The cardinal rule of contract law that comes into play when analyzing the language of a written instrument is that the document must be considered in light of the situation and relationship of the parties, the circumstances surrounding them *at the time of the contract*, and the nature of the subject-matter and the apparent purpose of the contract. E.g., *Fox* v. *Johnson & Wimsatt, Inc.*, 75 U.S. App. D.C. 211, 127 F.2d 729 (1942); *Aronsen* v. *K. Arakelian, Inc.*, 154 F.2d 231 (7th Cir. 1946).

Applying this rule to the facts of this case there can be no dispute that the Navy was using the VRB at the time the Plaintiffs signed their extension, to induce reenlistment in critical skill areas. The Plaintiffs committed themselves to six-year obligations in critical skill areas "in consideration for pay . . ." that the Defendants were paying all other critical skill first term enlistees. The Defendants cannot suspend the VRB's in a retroactive fashion, not after the Defendants have obtained their full bargained-

for exchange under the contract, i.e., an obligated work force. Their suspension of the VRB payment can apply only to those first term reenlistments which were signed after July 1, 1972.

If the Defendants did not want to be committed to the payment of the VRB, they should have made a self-evident provision in the contract. The printed form contract, after all, was drafted solely by the Defendants; its language was entirely within their control.[6] In addition, it is elemental that a contract must be construed most strongly against the authors which in this case was the government. E.g., *Alcoa S.S. Co.* v. *U.S.*, 338 U.S. 421 (1950); *John W. Johnson, Inc.* v. *Basic Construction Co.*, 139 U.S. App. D.C. 85, 429 F.2d 764 (1970).

Therefore, the Court holds that the Plaintiffs are entitled to recover the variable reenlistment bonus applicable to their critical skill rating which was in effect at the time they signed their reenlistment contract.

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[6] A self-evident provision that the Defendants included in the original enlistment contract was a certification that no promise was made as to duty assignment, geographical area, schooling, special programs, assignment of government quarters or transportation of dependents. This provision appears to be superceded by the reenlistment contract's promise of special training (schooling, special programs) in the Advanced Electronic Field training program.

VII. THE AWARD OF ATTORNEY'S FEES MUST BE DETERMINED BY *KISER* CLASS ACTION STANDARD

Plaintiffs' counsel requests $175,000.00 as an appropriate award of attorney's fees. Counsel derived the figure of their proposed award both by a fee of $200 per hour or 25% of the estimated class recovery. Counsel have received a retainer of $2,700.00 from the representative Plaintiffs and have a contract for legal fees designating charges of $125 to $200 per hour for partners and counsel and $40 to $60 per hour for law clerks.

Counsel have submitted time records and a disbursement sheet. Counsel's affidavit filed August 29, 1973 indicates 378½ hours of partner time and 221 hours of clerk time has been expended on this case. This sum is the total for both the New York and Washington offices.

Since this case was filed on March 30, 1973, Plaintiffs' counsel have appeared in court twice: the first appearance was on a motion for a temporary restraining order, to prevent the transfer of the Plaintiffs from their duty stations in the Washington area pending a determination of the case, and second, on a hearing on the cross motions for summary judgment. At the second court appearance, counsel was granted leave to file an amended complaint to prevent the case from being dismissed on a technicality—lack of subject matter jurisdiction. Upon filing their amended complaint, counsel submitted a memorandum on

the question of attorney's fees as the Court had requested.

As this is a class action, the Court finds the appropriate standard for the determination of attorney's fees is the standard and policy considerations set out by this Court in the case of *Kiser* v. *Miller*, et al, C.A. 2599-70 and C.A. 2088-71, filed August 29, 1973. Applying that standard to the facts of this case, the Court has determined that an award of $14,729.00 is appropriate in this case.

In making this determination, the Court finds that $40 an hour is an appropriate reflection of the effort and skill expended in this case as well as the result achieved. The Court also finds that an hourly rate of $6.00 per hour is an appropriate fee for law clerks, considering the prevailing wage for their services.

Upon examination of the time records, the Court noted that a majority of the New York counsel's time was spent solely in telephone conferences with Washington counsel and that consisted of over 60 hours of the partner's recorded 82 hours. It also appears that there was a great amount of duplication of law clerk research effort between the two offices. Therefore, the Court has reduced the number of hours expended by the New York partner to 22 hours and has reduced the amount of clerk time recorded in each office by one-half, producing a total of 110 hours of clerk time. The total number of partners' time used to compute the fee was 318¼ hours. The total hourly fee then is $13,390.00—$12,730.00 for partner's time and $660.00 for clerk's time. In

addition, the Court has added a 10% premium as an incentive fee, bringing the total award to $14,729.00. This award does not include the $2,700.00 retainer fee which will be dealt with *infra*.

The payment of attorney's fees will be made from the class recovery. Each class member's individual recovery will be taxed for his pro-rata share of the attorney's fee. In addition, counsel must refund the $2,700.00 in retainer fees to the representative plaintiffs, since counsel has received a Court award of attorneys' fees.

Section 2412 of Title 28 of the United States Code does not permit the Court to enter a judgment for costs against the United States government unless it is expressly authorized to do so by statute. Section 2412 expressly excludes the taxing of attorney's fees and expenses. *See* 6 Moore, *Federal Practice*, ¶ 54.75 [3.-2] at 1558 (1972). H.R. Rep. No. 1535, *1966 U.S. Code Cong. and Admin. News* 2527, 2531. Therefore, although equity would require taxing of attorney's fees to the defendants in this case, the statute precludes this Court from so doing.

As to the matter of costs and expenses, the Court finds $7,137.75 to be grossly excessive and not normally taxed, and, accordingly, disallows the same. Stenographic services and xeroxing are matters counsel should provide as of course in connection with the rendition of legal services. The Court notes that there was no discovery or depositions taken in this case, and that kind of expense which would be allowable is not pertinent here. Although the Court

is not in a position to dictate to counsel how to run their offices with the greatest economy and efficiency, the Court will not permit these costs to be taxed to the class. The costs listed in the disbursement record are to be absorbed by counsel.

Dated: September 28, 1973

/s/ Charles R. Richey
CHARLES R. RICHEY
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 626-73

[Filed Sep. 28, 1973, James F. Davey, Clerk]

NICHOLAS J. LARINOFF, JR., ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

ORDER

This case came before the Court on Cross Motions for Summary Judgment. The Court having considered both parties' Memoranda of Points and Authorities in support of their Motions and in opposition to opposing motions, and having heard argument of counsel and in accordance with the Court's Memorandum opinion of even date herewith, it is, by the Court this 28th day of September, 1973,

ORDERED, that this matter hereby is certified as a class action under Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure to include those enlisted Navy personnel who had (or earned after entering a special training program) a critical military skill, who signed their first term reenlistment contract when that critical military skill was eligible for a Variable Reenlistment Bonus (VRB), but who were denied the VRB because their reenlistment period began to run after the suspension of the VRB on July 1, 1972; and it is

FURTHER ORDERED, that judgment be entered against the Defendants for breach of their reenlistment contract obligation to pay the members of the class the VRB in effect at the execution of the reenlistment contract execution, when the members of the class began their reenlistment period; and it is

FURTHER ORDERED, that the Defendants pay to the members of the class the VRB authorized under 37 U.S.C. § 308(g) for first term reenlistment; and it is

FURTHER ORDERED, that the Plaintiffs' counsel be awarded $14,729.00 in attorney's fees to be paid from the class recovery as more particularly described in the Court's Opinion of even date herewith. Each individual recovery shall be taxed for its pro-rata share of this award; and it is

FURTHER ORDERED, that Plaintiffs' counsel refund to the representative Plaintiffs $2,700.00 in retainer fees.

/s/ Charles R. Richey
CHARLES R. RICHEY
United States District Judge

APPENDIX F

STATUTES AND REGULATIONS INVOLVED

The Act of September 7, 1962, Pub. L. No. 87-649, 76 Stat. 467 [formerly 37 U.S.C. 308(a) through (f)]:

(a) Subject to subsections (b) and (c) of this section, a member of a uniformed service who reenlists in a regular component of the service concerned within three months after the date of his discharge or release from compulsory or voluntary active duty (other than for training), or who voluntarily extends his enlistment for at least two years, and who is not covered by section 207 of the Career Compensation Act of 1949, as amended (70 Stat. 338), is entitled to a bonus computed as follows:

Reenlistment involved [1]	Column 1 Take—	Column 2 Multiply by—
First	Monthly basic pay to which member was entitled at the time of discharge or release.[2]	Number of years specified in reenlistment contract, or six, if none specified.[3]
Second	Two-thirds of the monthly basic pay to which the member was entitled at the time of discharge or release.[4]	Do.[3]
Third	One-third of the monthly basic pay to which the member was entitled at the time of discharge or release.[5]	Do.[3]
Fourth (and subsequent)	One-sixth of the monthly basic pay to which the member was entitled at the time of discharge or release.[5]	Do.[3]

[1] Any reenlistment when a bonus was not authorized is not counted.

[2] Two-thirds of the monthly basic pay in the case of a member in pay grade E-1 at the time of discharge or release.

[3] On the sixth anniversary of an indefinite reenlistment, and on each anniversary thereafter, the member is entitled to a bonus equal to one-third of the monthly basic pay to which he is entitled on that anniversary date.

[4] A bonus may not be paid to a member in pay grade E-1 or E-2 at the time of discharge or release.

[5] A bonus may not be paid to a member in pay grade E-1, E-2, or E-3 at the time of dicharge or release.

(b) A member who reenlists—

(1) during his prescribed period of basic recruit training; or

(2) after completing 20 years of active Federal service;

is not entitled to a bonus. A member who reenlists before completing 20 years of active Federal service, but who will, under that enlistment, complete more than 20 years of that service, is entitled to a bonus

computed by using as a multiplier only the number of years that, when added to his previous service, totals 20 years.

(c) The total amount that may be paid to a member under this section, or under this section and any other law authorizing a reenlistment bonus, may not be more than $2,000.

(d) An officer of a uniformed service who reenlists in that service within three months after his release from active duty as an officer is entitled to a bonus computed under subsection (a) of this section, if he served as an enlisted member in that service immediately before serving as an officer. For the purposes of this subsection, the monthly basic pay, or appropriate fraction if the member received a bonus for a prior enlistment, of the grade in which he is enlisted, computed in accordance with his years of service computed under section 205 of this title, shall be used in column 1 of the table in subsection (a) of this section instead of the monthly basic pay to which he was entitled at the time of his release from active duty as an officer.

(e) Under regulations approved by the Secretary of Defense, or by the Secretary of the Treasury with respect to the Coast Guard, a member who voluntarily, or because of his misconduct, does not complete the term of enlistment for which a bonus was paid to him under this section shall refund that percentage of the bonus that the unexpired part of his enlistment is of the total enlistment period for which the bonus was paid.

(f) The Secretary concerned may prescribe regulations for the administration of this section in his department.

The Act of August 21, 1965, Pub. L. No. 89-132, § 3, 79 Stat. 547 [formerly 37 U.S.C. 308(g)]:

(g) Under regulations to be prescribed by the Secretary of Defense, or the Secretary of the Treasury with respect to the Coast Guard when it is not operating as a service in the Navy, a member who is designated as having a critical military skill and who is entitled to a bonus computed under subsection (a) of this section upon his first reenlistment may be paid an additional amount not more than four times the amount of that bonus. The additional amount shall be paid in equal yearly installments in each year of the reenlistment period. However, in meritorious cases the additional amount may be paid in fewer installments if the Secretary concerned determines it to be in the best interest of the members. An amount paid under this subsection does not count against the limitation prescribed by subsection (c) of this section on the total amount that may be paid under this section.

ARMED FORCES ENLISTED PERSONNEL BONUS REVISION ACT OF 1974, Pub. L. 93-277, 88 Stat. 19

An Act to amend chapter 5 of title 37, United States Code, to revise the special pay bonus structure re-

lating to members of the armed forces, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That:

This Act may be cited as the "Armed Forces Enlisted Personnel Bonus Revision Act of 1974".

Sec. 2. Chapter 5 of title 37, United States Code, is amended as follows:

(1) Section 308 is amended to read as follows:

"§ 308. Special pay: reenlistment bonus

"(a) A member of a uniformed service who—

"(1) has completed at least twenty-one months of continuous active duty (other than for training) but not more than ten years of active duty;

"(2) is designated as having a critical military skill by the Secretary of Defense, or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy;

"(3) is not receiving special pay under section 312a of this title; and

"(4) reenlists or voluntarily extends his enlistment in a regular component of the service concerned for a period of at least three years;

may be paid a bonus, not to exceed six months of the basic pay to which he was entitled at the time of his discharge or release, multiplied by the number of years, or the monthly fractions

thereof, of additional obligated service, not to exceed six years, or $15,000, whichever is the lesser amount. Obligated service in excess of twelve years will not be used for bonus computation.

"(b) Bonus payments authorized under this section may be paid in either a lump sum or in installments.

"(c) For the purpose of computing the reenlistment bonus in the case of an officer with prior enlisted service who may be entitled to a bonus under subsection (a) of this section, the monthly basic pay of the grade in which he is enlisted, computed in accordance with his years of service computed under section 205 of this title, shall be used instead of the monthly basic pay to which he was entitled at the time of his release from active duty as an officer.

"(d) A member who voluntarily, or because of his misconduct, does not complete the term of enlistment for which a bonus was paid to him under this section shall refund that percentage of the bonus that the unexpired part of his enlistment is of the total enlistment period for which the bonus was paid.

"(e) This section shall be administered under regulations prescribed by the Secretary of Defense for the armed forces under his jurisdiction, and by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy.

"(f) No bonus shall be paid under this section with respect to any reenlistment, or voluntary extension of an active-duty enlistment, in the armed forces entered into after June 30, 1977."

(2) Section 308a is amended to read as follows:

"§ 308a. Special pay: enlistment bonus

"(a) Notwithstanding section 514(a) of title 10 or any other law, under regulations prescribed by the Secretary of Defense, or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, a person who enlists in an armed force for a period of at least four years in a skill designated as critical, or who extends his initial period of active duty in that armed force to a total of at least four years in a skill designated as critical, may be paid a bonus in an amount prescribed by the appropriate Secretary, but not more than $3,000. The bonus may be paid in a lump sum or in equal periodic installments, as determined by the appropriate Secretary.

"(b) Under regulations prescribed by the Secretary of Defense, or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, a person who voluntarily, or because of his misconduct, does not complete the term of enlistment for which a bonus was paid to him under this section shall refund that percentage of the bonus that the unexpired part of his enlistment is of the total enlistment period for which the bonus was paid.

"(c) No bonus shall be paid under this section with respect to any enlistment or extension of an initial period of active duty in the armed forces made after June 30, 1977."

Sec. 3. Notwithstanding section 308 of Title 37, United States Code, as amended by this Act, a member of a uniformed service on active duty on the effective date of this Act, who would have been eligible, at the end of his current or subsequent enlistment, for the reenlistment bonus prescribed in section 308(a) or (d) of that title, as it existed on the day before the effective date of this Act, shall continue to be eligible for the reenlistment bonus under that section as it existed on the day before the effective date of this Act. If a member is also eligible for the reenlistment bonus prescribed in that section as amended by this Act, he may elect to receive either one of those reenlistment bonuses. However, a member's eligibility under section 308(a) or (d) of that title, as it existed on the day before the effective date of this Act, terminates when he has received a total of $2,000 in reenlistment bonus payments, received under either section 308(a) or (d) of that title as it existed on the day before the effective date of this Act, or under section 308 of that title, as amended by this Act, or from a combination of both.

Sec. 4. The amendments made by this Act become effective on the first day of the month following the date of enactment.

Approved May 10, 1974.

37 U.S.C. 906 provides in relevant part:

A member of the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be, who extends his enlistment under section 509 of title 10 is entitled to the same pay and allowances as though he had reenlisted.

DEPARTMENT OF DEFENSE DIRECTIVE 1304.14:

* * * *

IV. OBJECTIVES AND POLICIES

* * * *

B. *Authority to Designate Military Skills*

1. *Designated Military Specialties.* Subject to review and prior approval by the Secretary of Defense, the Secretary of a Military Department may designate a military specialty for award of the Variable Reenlistment Bonus, Shortage Specialty (Proficiency Pay) or a combination of both these awards in accordance with the criteria specified in subsection D. below.

* * * *

F. *Reduction and Termination of Awards.* When a military skill is designated for reduction or termination of award an effective date for reduction or termination of awards shall be established and announced to the field at least 90 days in advance. All awards on or after that effective date in military skills designated for reduction of award level will be at the level effective that date and no new awards will be made on or after the effective date in military skills designated for termination of awards.

1. *For Both Variable Reenlistment Bonus and Shortage Specialty (Proficiency Pay).* Secretaries of the Military Departments and the Assistant Secretary of Defense (Manpower and Reserve Affairs) will conduct an annual review of the retention and career manning situation in any military specialty that has attained or is projected to attain a career manning level of more than 105 percent.

   a. If it no longer meets the criteria of subsection IV.D. above, it will be designated for either reduction or termination of award.

   b. The review will consider the projected retention and career manning situations in the absence of the then current award so that a military specialty will not be designated for reduction or termination of award solely because the then current award has attained and is sustaining adequate retention and career manning in the military specialty.

* * * *

DEPARTMENT OF DEFENSE INSTRUCTION 1304.15:

* * * *

V. *CRITERIA*

* * * *

B. *Individual Eligibility for Receipt of Awards*

1. *Variable Reenlistment Bonus.* An enlisted member is eligible to receive a Variable Reenlistment Bonus if he meets all the following conditions:

* * * *

b. Has completed at least 21 months of continuous active service other than active duty for training immediately prior to discharge, release from active duty, or extension of enlistment.

* * * *

f. Attains eligibility prior to the effective date of termination of awards in any military specialty designated for termination of the award. Member must attain eligibility prior to the effective date of a reduction of award level to be eligible for the higher award level. Eligibility attained through any modification of an existing service obligation, including any early discharge granted pursuant to 10 U.S.C. 1171, must have been attained prior to the date the au-

thority approving the modification was notified of the prospective termination or reduction of award in the military specialty.

* * * *

VI. *MAINTENANCE, REDUCTION, AND TERMINATION OF AWARDS*

A. *Variable Reenlistment Bonus.* Members serving in a military specialty designated for reduction or termination of award under the provisions of subsection IV.F. of reference (a), will receive the award level effective on the date of their reenlistment or extension of enlistment, except as provided in paragraph V.B.1.f. above.

* * * *

BUPERS INSTRUCTION 1133.18B
(December 19, 1968)

From: Chief of Naval Personnel

To: All Ships and Stations (less Marine Corps field addressees not having Navy personnel attached)

Subj: Variable Reenlistment Bonus (VRB) Program

* * * *

4. *Definitions*

* * * *

c. *VRB Multiple.* The VRB multiple is established by a relative ranking of all ratings in order of career petty officer shortage. From this ranking, and considering the training investment, an appropriate VRB multiple is assigned to the ratings with career petty officer shortages. This determination will be performed as required and at least annually. Enclosure (1) will be revised accordingly. Enclosure (2) shows the effective dates and past VRB multiple assignments, and demonstrates that VRB eligibility changes periodically according to service needs.

* * * *

5. *Policy*

* * * *

f. A review of current and projected manning and retention situations will be conducted in the ratings NEC's which attain or are expected to attain a career manning level of 105%. If it no longer meets the criteria in the table above, the rating NEC will be designated for reduction or termination of the award. In such case, the effective date of the reduction or termination will be announced to the field at least 90 days in advance.

* * * *

i. VRB eligibility is not retroactive. Entitlement to a VRB vests only on the date the member reenlists (and is entitled to a first regular reenlistment bonus) and only if his rating or NEC is then currently on the effective list in enclosure (1), and only at the multiple specified therein. To prevent error and misunderstanding, enclosure (1) will always include an

effective date of the listing. Retroactive payment of VRB to a member whose rating or multiple has been added to or changed on the list, but who reenlisted before the effective date, cannot be authorized.

6. *Eligibility.* To receive the VRB an individual must meet all of the following requirements for which no waivers will be made.

* * * *

d. Have completed at least 21 months of continuous active service, other than active duty for training, immediately prior to becoming eligible for the first regular reenlistment bonus.

* * * *

g. Attain eligibility prior to the effective date of termination of the VRB award in a rating NEC designated for termination. Eligibility attained through an early discharge for the purpose of immediate reenlistment, or extension of enlistment, must have been attained prior to the date on which the prospective termination is announced.

VRB ELIGIBLE RATINGS WITH MULTIPLES

Effective 1 July 1969

RATING	MULTIPLE
Aviation Fire Control Technician (AQ)	4
Aviation Electronics Technician (AT)	4
Aviation Anti-Submarine Warfare Operator (AW)	4
Boilerman (BT)	4
Communications Tech. (CT)	4
Damage Controlman (DC)	4
Data Processing Tech. (DP)	4
Data Systems Technician (DS)	4
Electricians Mate (EM)	4
Engineman (EN)	4
Electronics Technician (ET)	4
Fire Control Technician (FT)	4
Interior Communications Electrician (IC)	4
Machinist's Mate (MM)	4
Photographic Intell. Man (PT)	4
Quartermaster (QM)	4
Radarman (RD)	4
Radioman (RM)	4
Shipfitter (SF)	4
Sonar-Technician (ST)	4
Air Controlman (AC)	3
Aviation Electrician's Mate (AE)	3
Aviation Ordnanceman (AO)	3
Gunner's Mate (GUNS) (GMG)	3
Gunner's Mate (TECH) (GMT)	3
Machinery Repairman (MR)	3
Opticalman (OM)	3
Signalman (SM)	3
Torpedoman's Mate (TM)	3
Builder (BU)	2
Construction Electrician (CE)	2
Construction Mechanic (CM)	2
Disbursing Clerk (DK)	2
Engineering Aid (EA)	2
Equipment Operator (EO)	2
NEC SKILL Hospital Corpsman (HM) (For Following NEC's Only)	
8406 Aviation Medicine Technician	2
841X Laboratory Technician	2
8432 Preventive Medicine Tech.	2
8492 Special Operations Tech.	2
8493 Medical Deep Sea Diving Tech.	2
Instrumentman (IM)	2
Steelworker (SW)	2
Utilities Man (UT)	2
Aerographer's Mate (AG)	1
Aviation Structural Mechanic (AM)	1
Commissaryman (CS)	1
Patternmaker (PM)	1
Storekeeper (SK)	1

INFORMATION OF SPECIAL INTEREST TO NAVAL PERSONNEL

BUPERSINST 1133.18B
of 19 December 1968

Subj: Variable Reenlistment Bonus (VRB) Program

* * * *

All Navy ratings are considered for VRB in accordance with criteria established by DOD. Those ratings eligible for the remainder of FY 69 are listed at their assigned multiple in enclosure (1) of the instruction.

* * * *

Since the number of careerists in a rating is significant in determining rating eligibility, the list of eligible ratings is subject to change.

* * * *

BUPERSMAN Art. C-1407:

* * * *

(1) *Definitions.* In the discussion of extensions of enlistments in this article, the following definitions are applicable:

* * * *

(c) "Extension becomes Operative"—This refers to the date on which the Extension of Enlistment goes into effect and service thereunder commences. Unless cancelled prior thereto under any one of the conditions set forth in paragraph (8) below, an Agreement to Extend Enlistment executed during an enlistment or an enlistment as extended becomes operative on the date next following the normal date

of expiration of enlistment, or the date of expiration of enlistment as voluntarily extended or as extended for the purpose of making up time not served, as appropriate.

* * * *

(8) *Cancellation of Extensions.*

* * * *

(b) Commanding officers *shall* cancel agreements to extend enlistment, prior to operative date, in the following cases:

* * * *

4. Except as provided in subparagraph 5 below, when an individual, through no fault of his own, has not received any of the benefits for which the extension was executed by the day next preceding the operative date of the extension. Thus, if a member executed an agreement to extend enlistment and has been ordered or assigned to duty, such as duty ashore, overseas service, or any special program, for which he agreed to extend or has had his tour date adjusted, been advanced, or has received any benefits therefrom, by the day next preceding the date the extension would become operative, the agreement to extend enlistment may not be cancelled. Members whose extensions are cancelled pursuant to the above who desire to continue on active duty may simultaneously therewith execute new extension or reenlist in accordance with applicable directives notwithstanding the time limits specified in Art. C-1407 (3)(a). In such cases if the individual executes a new extension, show as a reason "To continue career."

Department of Defense Pay And Entitlement Manual:

CHAPTER 9

SPECIAL PAY—REENLISTMENT BONUS—ENLISTED MEMBERS

SECTION A—
REGULAR REENLISTMENT BONUS

(37 U.S.C. 308(a) through (c))

* * * *

10905. Time of Payment

Payment of regular reenlistment bonus is normally made on the day the member reenlists. A member who extends his enlistment for 2 years or more is not paid the bonus for the extension until he actually begins serving the extension.

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SECTION B—

VARIABLE REENLISTMENT BONUS

37 U.S.C. 308(g)

10911. Variable Reenlistment Bonus (VRB)

* * * *

10913. Method and Intervals of Payment

The VRB is paid in equal annual installments. The first installment is payable at the same time the regular reenlistment bonus is paid. Later installments

are payable on the anniversary date in each year of the reenlistment period, unless there is lost time. In this case the subsequent installment payments are delayed by the number of days of lost time. Payment may be made in fewer installments in meritorious cases when authorized. Application for reduction in the number of installments is proccessed in accordance with the prescribing personnel directives of the service concerned.

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